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SUPREME COURT, U.S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1952

## No. 287

AL POLIZZI, PETITIONER,

*vs.*

COWLES MAGAZINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 20, 1952
CERTIORARI GRANTED OCTOBER 20, 1952

# SUPREME COURT OF THE UNITED STATES

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[fol. 1]

# IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

No. 3439

AL POLIZZI, Plaintiff,

against

COWLES MAGAZINES, INC., a Corporation, Defendant

PETITION FOR REMOVAL—Filed July 12, 1950

To The District Court Of The United States For The Southern District Of Florida:

The petition of the defendant herein Cowles Magazines, Inc., by its Vice-President Marvin C. Whatmore, respectfully shows to this Honorable Court:

1. The petitioner is the defendant herein.

2. The above entitled action was commenced on June 28, 1950 in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, at Law, the cause being numbered therein 24258-D.

3. The action is a civil action, being one sounding in libel in which the plaintiff seeks to recover the sum of $500,000 in damages, because of the publication in Look Magazine, a periodical published by the defendant, of a certain article entitled U. S. Crime: Its Bosses Are Making Millions.

[fol. 2] 4. The plaintiff, at the time of the commencement of said action, was, and he is, a citizen of the State of Florida, and not a citizen of the state of Iowa. The defendant, at the time of the commencement of said action, was, and it is, a corporation duly organized and existing under the laws of the State of Iowa, and not of the State of Florida. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

5. Upon information and belief, on June 30, 1950, a copy of the summons and complaint in the action was served upon one Ray J. Jennings, who, I am informed by the attorneys for The American News Company, Inc., is an em-

ployee of said corporation. No copy of the summons and complaint has ever been served upon any officer, director, general manager, business agent, or other agent, representative, employee or executive of the defendant. Nevertheless, as your petitioner is informed and believes, it is the contention of the plaintiff that service upon the said Ray J. Jennings constitutes good and sufficient service upon the defendant corporation, inasmuch as the plaintiff contends that the American News Company, Inc. was and is a corporate agent of the defendant corporation.

6. A notice of motion to vacate said service, based upon the affidavits of Marvin C. Whatmore, Vice President of the petitioner, and Guy King, Vice President of The American News Company, Inc., was filed in the Circuit Court of Dade County, wherein this action was then pending, on July 10, 1950, but said motion has been neither heard nor determined. A notice of motion to bring on said motion for hearing in this Court will be filed simultaneously with the filing of this [fol. 3] petition for removal, and the appearance herein of your petitioner is made solely for the purpose of removing the above-entitled action to this Honorable Court and contesting the alleged service of the summons and complaint herein upon the defendant.

7. The petitioner does not intend by the filing of this petition or the notice of motion simultaneously herewith, to appear generally in said action or for any purpose other than those specifically stated.

Wherefore, your petitioner respectfully prays that said action and all further proceedings herein be removed to this Honorable Court, that this Court accept and approve the bond filed herewith, and for such other or further relief as the Court may deem proper in the premises.

Dated: New York, New York, July 10, 1950.

Cowles Magazines, Inc., By Marvin C. Whatmore, Vice President.

On July 10, 1950, affidavit, to the above Petition, that same was duly sworn to, was filed.

IN UNITED STATES DISTRICT COURT

ORDER—July 19, 1950

The Court, recognizing that it is essential and necessary that there be before the Court copies of all records and proceedings filed in the above cause in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, [fol. 4] Florida (Al Polizzi, Plaintiff v. Cowles Magazines, Inc., Defendant, Case No. 24258-D) prior to the filing therein of Petition for Removal for the purpose of enabling the Court to properly and expeditiously hear and determine the question of lack of jurisdiction over the Defendant, and further recognizing that the filing of such copies with the Clerk of this Court is a necessary step in bringing the question of lack of jurisdiction over the defendant to a hearing and decision.

It is ordered, that pursuant to the provisions of Section 1447(b) of Title 28 of U.S.C.A., the Defendant, being the Petitioner in the Petition for Removal filed in this Court on July 12, 1950, is hereby required to file prior to September 7, 1950, the date on which a hearing on such question of lack of jurisdiction has been scheduled before the Court, with the Clerk of this Court copies of all records and proceedings filed in the aforesaid State Court prior to the filing therein of the aforesaid Petition for Removal, and further that the Clerk of this Court is hereby directed to mail to counsel for Plaintiff and Defendant a conformed copy of this order.

Done and Ordered at Miami, Florida, this 19th day of July, 1950.

(S.) John W. Holland, Judge.

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[fol. 5] IN UNITED STATES DISTRICT COURT

RETURN OF DEFENDANT TO ORDER OF JULY 19, 1950—Filed July 31, 1950

Defendant, through its undersigned attorneys, not appearing generally, or otherwise submitting itself or consenting to the jurisdiction of the Court, with full reservation and without waiver of any defenses or objections which may be

available to the defendant, particularly but not exclusively those stated in defendant's Motion to Dismiss filed in the above case in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (Case No. 24258-D) on July 10, 1950, hearing on which has been scheduled by this Court for September 7, 1950, at 10:00 a.m., files pursuant to an Order of this Court entered July 19, 1950, with the Clerk of this Court copies of all records and proceedings filed in the aforesaid Circuit Court, prior to the filing of the Petition for Removal therein.

(S.) Loftin, Anderson, Scott McCarthy & Preston, (Loftin, Anderson, Scott McCarthy & Preston), (S.) Will M. Preston, (Will M. Preston), Attorneys for Defendant. 627 Ingraham Building, Miami, Florida.

Certificate of service omitted.

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[fol. 6] In the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, at Law. Cause Numbered 24258-D.

AL POLIZZI, Plaintiff,

vs.

COWLES MAGAZINES, INC. a corporation, Defendant

COMPLAINT (FOR LIBEL)

The plaintiff, Al Polizzi, sues the defendant, Cowles Magazines, Inc., a corporation (of a state other than the State of Florida), assigning, as grounds for his complaint, the facts hereinafter alleged.

1. The plaintiff is, and has been continuously since 1945, a resident of the City of Coral Gables in Dade County, Florida.

2. Since the establishment of his residence in such city in 1945 the plaintiff has conducted and demeaned himself [fol. 7] honestly and uprightly, has been law-abiding and trustworthy and has striven zealously to earn and retain

among his friends, acquaintances and neighbors in such city a reputation for moral worth and integrity. He has been engaged since shortly after the establishment of such residence in the building construction business in such city. He is, and has been continuously since its formation in August, 1947, an officer, director and stockholder of Thompson-Polizzi Construction Company, a Florida corporation, the principal office and place of business of which is in such city. His associates in such business are men who enjoy a splendid personal and business reputation in such city.

3. Before the publication and circulation by the defendant of the false, defamatory and libelous article hereinafter mentioned and described, the plaintiff had earned and enjoyed a reputation among his friends, acquaintances and neighbors in the City of Coral Gables as an honest, upright, law-abiding and trustworthy man and his financial credit, as well as that of the mentioned corporation of which he is an officer, director and stockholder, was good. Such corporation, which since its formation has been engaged in the building construction business, principally in the City of Coral Gables had been operating successfully and profitably; and, because of his position as an officer, director and stockholder of such corporation, the plaintiff had been realizing a substantial income from its business and financial operations.

4. Before and at the time of the publication and circulation by the defendant of the false, defamatory and libelous [fol. 8] article hereinafter mentioned and described, the defendant knew, or could and should have learned of, the facts alleged in the preceding paragraphs.

5. The defendant is the publisher of a national weekly magazine named and known as "Look." Such magazine is widely sold and circulated in the City of Coral Gables, the city in which the plaintiff resides, as well as throughout the State of Florida and all the other states of the nation. It is published weekly and is transmitted by mail to its subscribers throughout the United States, including numerous subscribers who reside in Coral Gables. Its weekly issues are on sale in all, or nearly all, of the newsstands, in many drug stores, and in various other places in the City of Coral Gables, as well as in all other cities, towns and villages throughout the United States. The issue of

such magazine dated May 23, 1950 was so circulated and sold.

6. In such issue of such magazine, which was published and circulated by the defendant, there was an article entitled "U. S. Crime: Its Bosses Are Making Millions." In such article, a true copy of which, marked "Exhibit A," is hereto appended and made a part of this complaint, the Mafia or Unione Siciliano is characterized as "the super-government of a nation-wide and world-wide crime organization which now has tentacles reaching into the Cabinet and the White House itself and almost every state capital." Certain criminal activities in which the Mafia or Unione Siciliano is and has been allegedly engaged were detailed in such article. It was said in such article that "even above [fol. 9] such powers as Luciano, who is international chief of the Unione Siciliano, Frank Costello and Chicago's Fischetti brothers, is the Mafia's board of directors—the Grand Counsel" and that "the Council members are the supreme arbiters of the works." It was further said in such article that "the chairman of the board—or grand councilor, as he is called—is Vincent Mangano, alias James Costa, of Brooklyn," and that "other councilors are Philip Mangano, Joseph Profaci, and Vincenzo Traina, all of Brooklyn; Paul (The Waiter) Ricca of Chicago; Stefano Margardino of Niagara Falls, N. Y.; Albert (Big Al) Polizzi of Cleveland; and Frank Milano of Akron, Ohio." In the chart which prominently appeared at the outset of the article, "Albert Polizzi" was designated as a member of the "Board of Directors of the Mafia (Unione Siciliano)" and beneath the chart it was stated that "the multibillion-dollar crime cartel in the United States operates along the lines of any huge business corporation," and that the "supreme arbiters are the little-known members of the board of directors of the Mafia, an outgrowth of the old Black Hand gang."

7. The statements in such article that the plaintiff, who was referred to as "Albert (Big Al) Polizzi" or as "Albert Polizzi," is one of the "councilors" or a member of the "board of directors" of the Mafia or Unione Siciliano were and are false, defamatory and libelous. The plaintiff is not, and has never been, a member of the Mafia or Unione Siciliano. He is not, and has never been, one of its "coun-

cilors" or a member of its "board of directors." He does not participate, and has never participated, in any of its activities.

[fol. 10] 8. The defendant knew, or ought to have known, that the statements mentioned and referred to in the preceding paragraph numbered 7 were false; but it nevertheless published and circulated such statements, illegally and wrongfully, either intentionally to destroy the plaintiff's reputation among his friends, acquaintances and neighbors in the City of Coral Gables, the city of his residence, as an honest, upright, law-abiding and trustworthy man, to ruin his financial credit and to vex, harass, annoy, distress, embarrass and humiliate him, or negligently without due regard to the results and effects of such publication and circulation.

9. Because, and as a direct and proximate result, of the publication and circulation by the defendant of such false, defamatory and libelous statements the plaintiff's reputation among his friends, acquaintances and neighbors in the City of Coral Gables as an honest, upright, law-abiding and trustworthy man has been greatly impaired, his financial credit and that of the mentioned corporation of which he is an officer, director and stockholder have been adversely affected and endangered, he has been vexed, harassed, annoyed, distressed, embarrassed and humiliated and he has experienced intense mental suffering and substantial financial losses. Such injuries and damages sustained by the plaintiff will continue and will affect his personal and business affairs throughout the remainder of his life.

10. More than five days before instituting this action the plaintiff, pursuant to, and in compliance with, the provisions of Section 770.01 of the Florida Statutes, served notice in writing on the defendant, specifying the article [fol. 11] in which such false, defamatory and libelous statements concerning him were made and specifying such statements; and in such written notice demanded that the defendant publish, or cause to be published, in a future issue of the magazine "Look" a full and fair correction of such statements and an appropriate retraction and apology in a place and type as conspicuous as those in which the mentioned article in the issue dated May 23, 1950 was published. A true copy of the letter in which such notice

was given and in which such demand was made, marked "Exhibit B," is hereto appended and made a part of this complaint. Such letter was mailed at Miami, Florida, on May 17, 1950 and was received by the defendant in due course of mail. The mentioned article in which such false, defamatory and libelous statements were made, while it appeared in an issue of such magazine dated May 23, 1950, was published and circulated, as hereinbefore alleged, prior to May 16, 1950.

11. The plaintiff claims damages, both actual and punitive or exemplary, in the sum of $500,000.

12. The plaintiff demands a trial by a jury.

June 28, 1950.

Vincent C. Giblin, David Drucker, Attorneys for Plaintiff, by Vincent C. Giblin, of Counsel.

Names and Addresses of Plaintiff's Attorneys: Vincent C. Giblin, David Drucker, 804 Ingraham Building, Miami (32), Florida.

# U.S. CRIME: ITS BOSSES ARE MAKING MILLIONS

**The American crime monopoly, well protected, rakes in illegal fortunes, then invests them in legal businesses**

By JACK LAIT and LEE MORTIMER

Authors of *New York Confidential* and of the recently published *Chicago Confidential*, from which this article is condensed. Copyright 1950 by Crown Publishers

When Jack "Greasy Thumb" Guzik, a Chicago mobster, was arrested on suspicion of the murder of a rival race track wire service operator, he had plenty to say to the cops who pinched him. "I've got more cash than Rockefeller," he warned, "and there's 20 of us with more than I have. No one's going to push us around."

We reposted that statement to a Treasury Department official who has been studying the workings of the underworld. He said that while Guzik is inclined to boast, he is certain "Greasy Thumb" has as much as $150,000,000 in currency in Chicago Safe deposit vaults.

And Guzik is way down in the hierarchy of the Mafia.

The Mafia, or the Unione Siciliano, is the super-government of a nationwide and world-wide crime organization which now has tentacles reaching into the Cabinet and the White House itself, and almost every state capital. It has huge Wall Street interests and connections in Canada, Latin America, England, France, Italy, Turkey, Greece, China and Outer Mongolia, and even through the Iron Curtain into Soviet Russia. The Unione Siciliano, in short, operates on a scale that defies belief. Merely to catalogue what the mob leaders own, and who protects them, would take more type than appears in a 300-page book.

Repeatedly, crime investigations have established sufficient proof of interstate violations and tax, immigration and dope dealings to convict mobsters by the hundreds. In nearly every instance since New York Mayor William O'Dwyer, as Kings County district attorney, convicted the heads of Murder, Inc., and Gov. Thomas E. Dewey, then New York D.A., convicted Charles (Lucky) Luciano and Jimmy Hines, every investi-

*(Continued on next page)*

## BOARD OF DIRECTORS of the MAFIA (UNIONE SICILIANO)

U. S. CRIME continued

# Syndicate service: pulling state, city political wires

gation that reaches figures of consequence in the Syndicate has been called off and stymied. One exception was the cleanup in 1943 of big movie extortioners—all of whom got preferential treatment.

The American Syndicate is run from above—with reigning headquarters in Italy and American headquarters in New York. But Chicago is the center of top importance. There, the Unione Siciliano has effected its highest degree of immunity, after a half century of the machinations of Jim Colosimo, Al Capone and the men they trained to carry on their work.

But above the Chicago setup, as the cartel expanded, there grew an executive hierarchy, like that of any great commercial corporation. The top executives, though, are not necessarily principal stockholders or by any means majority owners.

### Grand Council Rules

Even above such powers as Luciano, who is international chief of the Unione Siciliano, Frank Costello and Chicago's Fischetti brothers is the Mafia's board of directors—the Grand Council. The Council members are the supreme arbiters of the works.

With the exception of Paul Ricca of Chicago, all of these supervisors calls made by Goebels. They prove conclusively that before any important step of any kind is taken, he is contacted for orders. And he, in turn contacts others. The records show that during the period when wires were being pulled to effect the release of the convicted movie extortionists from the Federal penitentiary, Goebels was constantly on the long-distance phone to Chicago.

### Mutual Aid Is Law

With Goebels on the job as chief expediter, the underworld Syndicate runs [illegible] precision and profit. The organization setup itself, though, must remain complicated in some ways. There is no way of knowing always which activities of Syndicate members are partnership operations and which are individual ones.

For instance, A may be the owner of a gambling joint by himself, and in partnership in a neighboring bawdy house with B. And B may own several enterprises and be in partnership with C and D and E in others. E also could have some holdings all his own. But in the final showdown, though A and E own nothing in common, they are allies and come to each other's aid if need be, to pull political wires when necessary and provide cash

**In a prostitution raid** in Peoria, Ill., women are led from brothel by detective. Syndicate-operated houses, politically protected, are seldom raided.

tello of New York, who was once Lucky's chief aide. Costello is the chief executive of a company doing business all over the United States, which he conducts for the benefit of the entire Syndicate. He also is the boss of local territories which are staked out for his own account. In addition to controlling the Eastern seaboard, Costello runs Louisiana and bosses the entire slot-machine industry in the United States.

### Adonis Is Eastern Chief

These enterprises are operated for him by assistants. For instance, Joseph Dato, alias Joe Adonis, is the deputy chief in the East for Costello, and he also runs numerhouse for the undercover campaign to weaken all anti-Roosevelt groups.

### Underworld Woos Politics

The underworld then began to perfect its tie-ups with big-city political machines. Wherever the dominant party was Republican, the mob was Republican. Where it was Democratic, you could be mighty sure the boys were good Democrats. In New York, when the American Labor Party was at its strongest, the underworld, fine proletarians all, played footsie with the Reds.

After the Democrats moved into Washington, the boys had a line

U. S. CRIME
continued

# Mob owns hotel and clothing chains, choice real estate

New York State troopers spring a playing enthusiasts. While law-

raid on a gambling house in Mechanicville, N. Y., arresting 60 horse- enforcement agencies combat gambling, Mafia's houses still thrive.

entree to the President were suspiciously involved in the scandal accompanying the parole of the notorious movie extortionists.

Charlie Fischetti, like his confrere Costello in New York, is thin-skinned about publicity. He does not like to be called a gangster. He prefers to think of himself as a man of the world and as a dilettante art connoisseur.

In the old days, gangsters weren't touchy. You could print anything you wanted to about Colosimo or Capone. They considered it a hazard of the business. Many of their kind loved it, were as vain about their "notices" as are actors.

### Honesty Is Best Policy

Today's mob leaders like to say they have "paid their debt to soci-

the Government will keep your confidence. This is not completely true.

Internal Revenue usually will not give the information to state authorities or to other departments of the Federal Government. But if it finds any violation of Treasury laws of any kind, this information will be transferred to the co-ordinating officer, who will then route it to the proper investigating agency.

Since the Treasury Department enforces the Narcotics Act—through violation of which a major

hotel management companies. It is more than possible that many of these agents do not exactly know in whose account they are buying property. A bank does not turn down a stranger who comes in with a million dollars in cash and asks the bank to invest it for him.

### Syndicate Sets Up Maze

When the Syndicate selects these agents, it sends go-betweens, possibly ten times removed from the main source. By setting up a maze of holding companies and interlocking directorates and private

Listed under individual ownership, but all belonging to the mob, are fifty residential hotels in Chicago's North Side. The world Syndicate owns a trans-Atlantic steamship line of foreign registry, and is busily engaged in building hotels and guest-houses throughout Latin America—some already opened. It has great holdings of movie stock and owns many motion picture theaters.

In many cities, the laundry business is controlled by the Syndicate. One of its most lucrative opera-

**A New York City fireman watches blaze** which destroys mountain of gambling machines. But the illegal gambling industry, nationally operated and controlled, has unlimited resources necessary to fend off vice crusades.

[fol. 16] EXHIBIT B TO COMPLAINT

May 16, 1950.

Cowles Magazines, Inc.,
488 Madison Avenue,
New York (22), New York.

GENTLEMEN:

You are hereby notified that in an article entitled "U. S. Crime: Its Bosses Are Making Millions" published in the May 23, 1950 issue of Look there are statements concerning me which are false, defamatory and libelous.

In such article the Mafia or Unione Siciliano is characterized as "the super-government of a nationwide and world-wide crime organization which now has tentacles reaching into the Cabinet and the White House itself and almost every state capital."

Certain criminal activities in which the Mafia or Unione Siciliano is and has been allegedly engaged are detailed in such article.

It is said in such article that "even above such powers as Luciano, who is international chief of the Unione Siciliano, Frank Costello and Chicago's Fischetti brothers, is the Mafia's board of directors—the Grand Council" and that "the Council members are the supreme arbiters of the works."

It is further stated in such article that "the chairman of the board—or grand councilor, as he is called—is Vincent Mangano, alias James Costa, of Brooklyn," and that "other councilors are Philip Mangano, Joseph Profaci and Vincenzo Traina, all of Brooklyn; Paul (The Waiter) Ricca [fol. 17] of Chicago, Stefano Margardino of Niagara Falls, N. Y.; Albert (Big Al) Polizzi of Cleveland; and Frank Milano of Akron, Ohio."

In the chart which prominently appears at the outset of the article, "Albert Polizzi" is designated as a member of the "Board of Directors of the Mafia (Unione Siciliano)" and beneath the chart it is stated that "the multibillion-dollar crime cartel in the United States operates along the lines of any huge business corporation," and that the "supreme arbiters are the little-known members of the

board of directors of the Mafia, an outgrowth of the old Black Hand gang."

The statements that I am one of the "councilors" or a member of the "board of directors" of the Mafia or Unione Siciliano are false, defamatory and libelous. I am not, and have never been, a member of such organization and, of course, am not, and have never been, one of its "councilors" or a member of its "board of directors." I have no knowledge of its activities and, of course, do not participate in them. There is no factual justification whatever for the publication and circulation of such false, defamatory and libelous statements.

I demand that you publish, or cause to be published in a future issue of Look, within ten days after the service of this notice, a full and fair correction of such statements and an appropriate retraction and apology in a place and type as conspicuous as those in which the mentioned article of May 23, 1950 was published.

Should you desire to communicate with me regarding the matter, you may address me in care of my attorney, Mr. Vincent C. Giblin, 804 Ingraham Building, Miami (32), [fol. 18] Florida, or you may communicate with him directly.

Very truly yours, Al Polizzi.

Copies to: Cowles Magazines, Inc., Look Building, Des Moines (4), Iowa; Mr. John Cowles, Chairman of Board, Cowles Magazines, Inc., 488 Madison Avenue, New York (22), New York; Mr. Gardner Cowles, Editor, Look, 488 Madison Avenue, New York (22), New York; Mr. Daniel D. Mich, Executive Editor, Look, 488 Madison Avenue, New York (22), New York; Mr. Henry Ehrlich, Managing Editor, Look, 488 Madison Avenue, New York (22), New York.

On June 29, 1950 a summons ad respondendum was issued by the Clerk of the Circuit Court for Dade County, Florida; that on July 6, 1950 two Sheriff's returns were filed in such [fol. 19] Circuit Court reciting respectively service of such summons, along with a copy of the complaint, on Ray J. Jennings as agent of the defendant and as agent of The American News Company, Inc., a corporation, as agent of the defendant; that on September 25, 1950 the plaintiff filed

a Motion to Quash these two Sheriff's Returns which recited service of summons, along with a copy of the complaint, on Ray J. Jennings as agent of the defendant and as agent of The American News Company, Inc., a corporation, as agent of the defendant and that on September 25, 1950 the Court entered an order quashing such returns.

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

[Title omitted]

MOTION TO DISMISS OF COWLES MAGAZINES, INC.—Filed July 10, 1950

The Defendant, not appearing generally in this action, files this Motion to Dismiss by its undersigned attorneys for the special limited purpose of respectfully raising the [fol. 20] question of lack of jurisdiction over the Defendant and moves the Court as follows:

To dismiss this action or in lieu thereof to quash the return of the purported service of summons on the grounds (a) that the defendant is a corporation duly organized and existing under the laws of the State of Iowa and was not and is not subject to process within the State of Florida; (b) the Defendant was not doing or carrying on business in Florida at the time of the purported or attempted service of summons on the Defendant and has never done business in Florida so as to be present in Florida; (c) Raymond J. Jennings was not at the time of the purported service of summons and never has been an agent transacting business for the Defendant in the State of Florida or officer, head, cashier, general manager, director, employee, business agent resident in the State of Florida or other representative of Defendant upon whom process could be lawfully served; (d) American News Company, a corporation organized and existing under the laws of Delaware and authorized to do business in Florida, was not at the time of the purported service of summons and never has been an agent transacting business for the Defendant in the State

of Florida; and (e) that the Defendant has not been properly served with process in this action, all of which appears in (1) the affidavits of Marvin C. Whatmore, Vice President and Business Manager of Defendant, and Guy King, Vice President of American News Company, hereto annexed as Exhibit A and Exhibit B, respectively, and (2) the deposition of Raymond J. Jennings taken by Plain-
[fol. 21] tiff in this action and of record in this action.

To dismiss the action or in lieu thereof to quash the return of purported service of summons on defendant on the further ground of lack of jurisdiction over the Defendant because, notwithstanding the fact that the purported service made and shown in the Sheriff's Return certified on July 5, 1950 is fatally defective on the grounds assigned in Paragraph 1 hereof, the purported service and return is further defective and jurisdiction has not been obtained over the Defendant in that it is a matter of public record in the office of the Secretary of State that by its June 8, 1950 Corporation Report and Tax Return the American News Company has designated 508 Consolidated Building, Jacksonville, Florida, as its place of business or domicile for the service of process and has named as agent for the purpose of accepting service of process on it The Corporation Company, all of which apears from Certificate of the Secretary of State of the State of Florida annexed hereto as Exhibit C. In view of the aforesaid designation by the American News Company, that portion of the Sheriff's Return certified on July 5, 1950 purportedly showing service on Ray J. Jennings "because of the absence of . . . all other officers and resident business agents of such corporate agency from the State of Florida" does not conform to but is contrary to the information shown in the annexed Certificate of the Secretary of State of the State of Florida. There, the purported service reflected by said July 5, 1950 Sheriff's
[fol. 22] Return is fatally defective and no jurisdiction over the Defendant was acquired by the attempted service.

(S.) Loftin, Anderson, Scott, McCarthy & Preston,
Will M. Preston, Attorneys for Defendant, Cowles Magazines, Inc.

627 Ingraham Building, Miami, Florida.

EXHIBIT "A" TO MOTION

Affidavit of Marvin C. Whatmore

[Title omitted]

STATE OF NEW YORK,
County of New York, ss:

Marvin C. Whatmore, being duly sworn, deposes and says:

I am Vice-President and Business Manager of the defendant Cowles Magazines, Inc., an Iowa corpora- [fol. 23] tion, which publishes Look, Quick and Flair Magazines. As such, I am in general charge of matters relating to the personnel of said corporation. This affidavit is submitted in support of the defendant's motion to vacate the alleged service of the summons and complaint herein upon said defendant corporation, and is made by me because I am personally familiar with the facts hereinafter set forth. The action is one sounding in libel, and the plaintiff seeks damages in the sum of $500,000.

I have been informed by David C. Gordon, Esq., assistant to our General Counsel, that a copy of said summons and complaint was served on Ray J. Jennings, local manager for The American News Company, Inc., in Miami, Florida, on June 30, 1950. The said Ray J. Jennings is not and has never been the president, vice-president, cashier, treasurer, secretary, general manager or any other officer or head of the defendant corporation; or a director, business agent or other agent, representative, or employee of said corporation, nor has he been connected with Cowles Magazines, Inc. in any way. He has no authority, express or implied, direct or indirect, to represent or act for said corporation in any respect whatsoever, and, in fact, has never done so.

I further state that The American News Company, Inc., is neither an affiliate nor a subsidiary of the said Cowles Magazines, Inc., nor has either corporation any financial interest, direct or indirect, in the other. No director, officer, employee or stockholder of either corporation is a director, officer, employee or stockholder of the other corporation. The American News Company, Inc. is not and has never

[fol. 24] been an agent or representative of Cowles Magazines, Inc., nor has it ever had any authority, express or implied, direct or indirect, to represent or act for Cowles Magazines, Inc., in any manner whatsoever, nor in fact has it ever done so.

The American News Company, Inc. is a corporation which, among other things, is engaged in the purchase from the publishers and in the resale of several score magazines, as well as trade books. Through its subsidiaries and affiliates it operates restaurants, newsstands and other facilities. It has no connection whatsoever with Cowles Magazines, Inc. Its sole business relationship with said corporation is as a purchaser of the magazines published by Cowles Magazines, Inc. The said magazines are delivered by Cowles Magazines, Inc. to The American News Company, Inc. at places designated by the latter, and from that point on Cowles Magazines, Inc. has no further control over said magazines. They become the sole property of The American News Company, Inc., which thereupon becomes obligated to pay for them, although there is an arrangement between the companies for the return of unsold copies within a limited time, for credit.

Cowles Magazines, Inc. is not now and has not at any time been qualified to do business in the State of Florida, and does not now and never has maintained any office or place of business in Florida. It does not now and never has maintained a telephone or a telephone listing in the State of Florida, and it does not now and has not ever conducted any business in said State. It has no warehouse, no bank account, and no property of any kind, tangible or intangible, in said State.

[fol. 25] I therefore respectfully request that the service of the summons and complaint upon said defendant corporation in the above entitled action be vacated.

(S.) Marvin C. Whatmore.

Sworn to before me this 6th day of July, 1950. (S.) Roselou F. Settanni, Notary Public, State of New York No. 03-8924900. Qualified in Bronx County. Certs. filed with Bronx & New York County Clerks & Registers. Commission expires March 30, 1952. (Seal.)

EXHIBIT "B" TO MOTION.

[Title omitted]

AFFIDAVIT

STATE OF NEW YORK,
County of New York,
Borough of Manhattan, ss.:

Guy King, being duly sworn, deposes and says:

I am Vice President of The American News Company in charge of magazine and periodical sales.

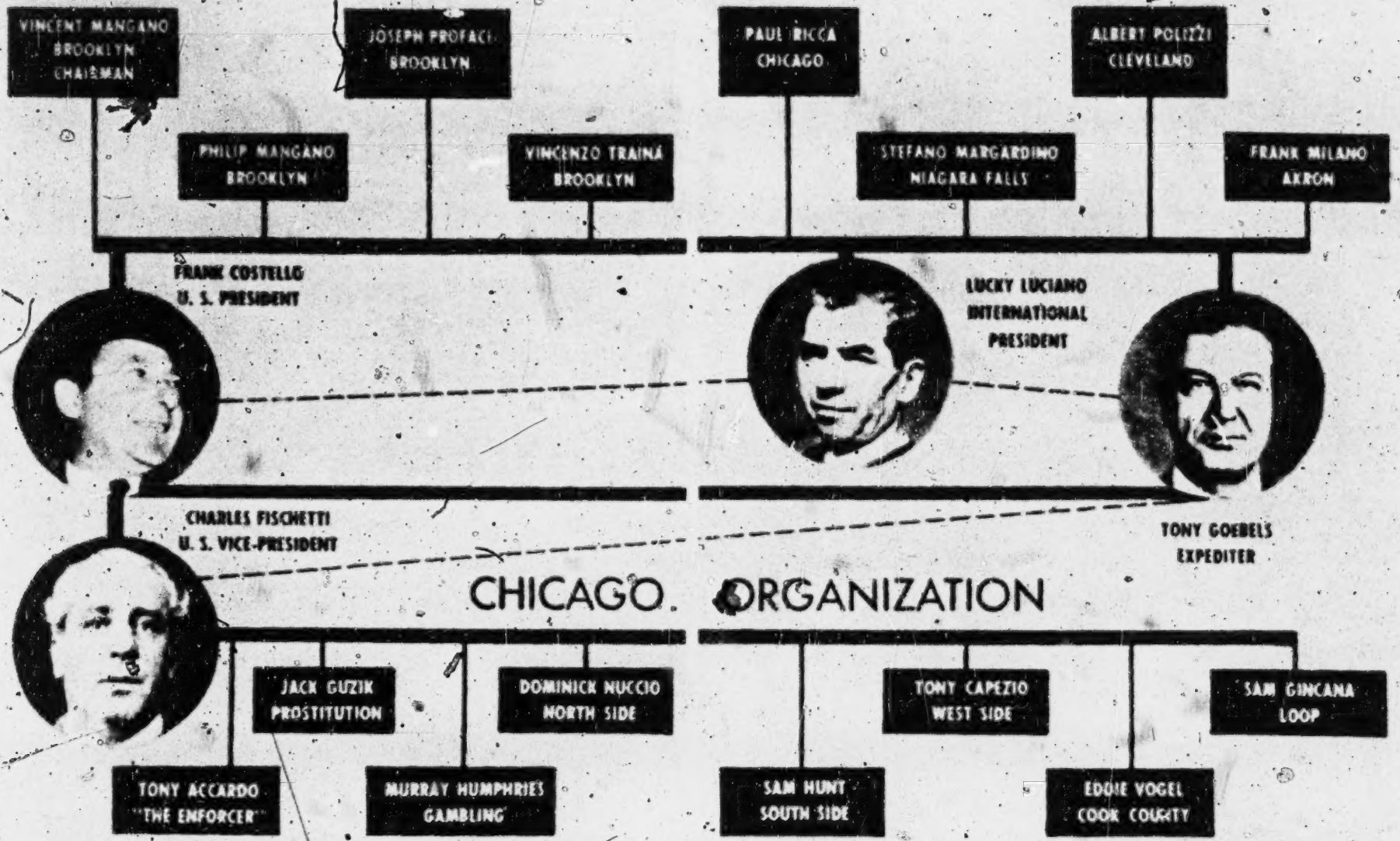
[fol. 26] The American News Company is a Delaware corporation with principal place of business at 131 Varick Street, New York, New York and duly qualified to do business in the State of Florida. The American News Company is engaged in the business of the purchase and sale at wholesale of books, magazines, periodicals, stationery and other articles of merchandise throughout the United States and in foreign countries.

The American News Company purchases magazines from publishers and sells them to retail dealers throughout the United States and including the State of Florida, with the right of reselling to the publishers all unsold copies.

In the ordinary course of its business as above described, The American News Company purchases weekly issues of Look Magazine from the publisher, Cowles Magazines, Inc., and sells the copies of said weekly issues of Look Magazine to retail dealers throughout the United States and including the State of Florida, with the right to resell to Cowles Magazines, Inc. all unsold copies. Cowles Magazines, Inc. is only one of in excess of one hundred publishers with whom The American News Company does business in connection with the purchase and sale at wholesale of magazines and periodicals on the same basis.

The American News Company in its business dealings with publishers is an independent contracting party and has no affiliation of any kind with Cowles Magazines, Inc. or any of the other publishers from whom it purchases magazines and periodicals.

[fol. 27] Cowles Magazines, Inc. has never authorized The American News Company or any of its representatives




**The multibillion-dollar** crime cartel in the United States operates along the lines of any huge business corporation. Supreme arbiters are the little known members of the board of directors of the Mafia, an outgrowth of the old Black Hand gang. International president is Charles (Lucky) Luciano, living in Italy. American president is Frank Costello, vice president is Charles Fischetti. Go between Tony Goebels makes the cartel click. In all major cities, specialists and territory bosses, similar to those in the Chicago organization, above, are appointed by Syndicate chiefs.

holders, or by any means majority owners.

### Grand Council Rules

Even above such powers as Luciano, who is international chief of the Unione Siciliano, Frank Costello and Chicago's Fischetti brothers is the Mafia's board of directors -the Grand Council. The Council members are the supreme arbiters of the works.

With the exception of Paul Ricca of Chicago, all of these councilors are unknown to the public. Few law-enforcement officers, including many who carry out these councilors' every order, have ever heard their names. This is the first time they have ever been printed.

The chairman of the board-or grand councilor, as he is called-is Vincent Mangano, alias James Costa, of Brooklyn. Other councilors are Philip Mangano, Joseph Profaci, and Vincenzo Traina, all of Brooklyn; Paul (The Waiter) Ricca of Chicago; Stefano Margardino of Niagara Falls, N. Y.; Albert (Big Al) Polizzi of Cleveland; and Frank Milano of Akron, Ohio. Meetings of the Grand Council are held in Cleveland.

### Goebels Pushes Buttons

The intermediary who carries orders from the secret Grand Council and such executives as Costello, Charlie Fischetti and others, is another unsung, unpublicized and generally unheard-of character. His name is Gaetano Ricci, but he is known to the underworld as Tony Ricci or Tony Goebels.

Goebels lives in Brooklyn, but from his apartment he transmits orders to the huge and sprawling underworld. No decision of any importance is taken without contacting Goebels, who is known in the underworld as "The King."

The authors have a list of phone

individual homes.

For instance, A may be the owner of a gambling joint by himself, and in partnership in a neighboring bawdy house with B. And B may own several enterprises and be in partnership with C and D and E in others. E also could have some holdings all his own. But in the final showdown, though A and E own nothing in common, they are allies and come to each other's aid if need be-to pull political wires when necessary and provide cash in emergencies.

Some of these enterprises may also be operated by A or B or C for the account of the Syndicate, the real owner. In cases like that, A, B or C is a district manager and gets a cut of the receipts for his efforts.

### Underlings Get Cut

Many boys further down the line -who have been useful in one capacity or another as torpedoes, fixers, collectors or front men-may be staked out with minor rackets. They may run neighborhood gambling houses, brothels, saloons, gas stations or hat-check concessions, which they then own themselves. But at all times, they are members of the Syndicate and can call on it for assistance.

Thus, though the Syndicate is set up loosely, it is ruled with stern efficiency. And anyone who gets too far out of line is quickly disposed of, as was Benjamin (Bugsy) Siegel last year.

The key figure in the executive setup is the notorious and infamous panderer, Lucky Luciano, deported to Italy on his release from Dannemora Penitentiary. Despite his involuntary departure and enforced absence from the operational field, Lucky is still the president of the International Crime Cartel.

The president of the American Crime Corporation is Frank Cos-

[illegible] the entire syndicate. He also is the boss of local territories which are staked out for his own account. In addition to controlling the Eastern seaboard, Costello runs Louisiana and bosses the entire slot-machine industry in the United States.

### Adonis Is Eastern Chief

These enterprises are operated for him by assistants. For instance, Joseph Dato, alias Joe Adonis, is the deputy chief in the East for Costello, and he also runs numerous gambling layouts. Adonis also personally owns all the gambling in northern New Jersey and several night clubs and brothels in Chicago's near North Side.

The vice-president of the American corporation and the second most powerful figure in the American underworld is Charles Fischetti, prominent Chicago citizen. He is nicknamed "Trigger Happy." As national vice-president, Fischetti shares with Costello the conduct of all underworld affairs in the United States. He has his fingers in the pie in every city.

In addition to being second in command, Fischetti, like Costello, also has individual holdings, with subordinates to superintend them. Fischetti is the president of the Illinois subsidiary, which he owns with many partners. He is a part owner in the St. Louis operation, and the sole owner in Kansas City.

### Costello Meets His Match

As the custodian of Kansas City, Fischetti is gradually becoming the top man in the nation's racket picture, possibly even more important than Costello. His growing power stems from the Syndicate's decision to tighten its political tie-ups some 15 or 18 years ago.

Frank Costello and Jimmy Hines went to Chicago in 1932 for the Democratic Convention which nominated Roosevelt. Their suite in the Drake Hotel was the power-

[illegible] the underworld began to perfect its tie-ups with big-city political machines. Wherever the dominant party was Republican, the mob was Republican. Where it was Democratic, you could be mighty sure the boys were good Democrats. In New York, when the American Labor Party was at its strongest, the underworld, fine proletarians all, played footsie with the Reds.

After the Democrats moved into Washington, the boys had a line practically into the White House, through their connections with the machines in New York, Chicago, Jersey City, Kansas City, Rhode Island, Memphis and New Orleans.

The Chicago mob extended its influence into Kansas City, where the death of Tom Pendergast left a hole. Charlie Fischetti's lieutenant, Tony Gizzo, went down there and took over the crime machine.

### Binaggio: His Rise and Fall

At the same time, one Charles Binaggio, a ward-heeler, rose rapidly as a political leader. For awhile, he stayed in the Pendergast organization, but later broke away and set up his north side outfit. In the 1946 and 1948 elections, Binaggio's boys delivered the votes in wholesale lots. It was charged in Congress that Gizzo had a hand in these victories.

Early this year, there were reports that Binaggio was in conflict with President Truman and the Pendergast machine because he refused to back Truman's choice for the U. S. Senate. Then, on April 6, Binaggio and a hoodlum bodyguard were killed by unknown gunmen.

That there has long been a tie-up between Missouri politics and the underworld was seen in testimony before a Congressional committee. It linked the President's military aide, Brig. Gen. Harry Vaughan, with Frank Costello. Certain Missouri politicians with

(Continued on next page)

of the world and as a dilettante art connoisseur.

In the old days, gangsters weren't touchy. You could print anything you wanted to about Colosimo or Capone. They considered it a hazard of the business. Many of their kind loved it, were as vain about their "notices" as are actors.

### Honesty Is Best Policy

Today's mob leaders like to say they have "paid their debt to society" for their youthful slips and are now respectable businessmen. This is partly true. For when the gangland wars were over, the Syndicate went into honest businesses on a big scale. It had untold wealth; so much that its very existence became perilous to the Syndicate.

The loot from rum-running, prostitution, narcotics, gambling and other forms of crime was almost valueless when hidden in safe-deposit vaults. Syndicate members could not spend such money in quantity because it would attract the attention of Internal Revenue agents and make them liable for income-tax violations, civilly and criminally.

The mobsters did not declare these huge sums. Being thieves at heart, they could not find it within themselves to make a fair income-tax return. They were advised by astute attorneys, whom they employed by the year at princely fees, that if they did make declarations about their illegal businesses they might be turned over to certain law enforcement bureaus.

### Mob Problem: Taxes

It is a popular misconception that information contained in income-tax returns is sacred and can not be referred to any other Government agency. The popular belief is that if you fairly and truthfully tell where you got the money, and then give Uncle Sam his cut, Internal Revenue usually will not give the information to state authorities or to other departments of the Federal Government. But if it finds any violation of Treasury laws of any kind, this information will be transferred to the co-ordinating officer, who will then route it to the proper investigating agency.

Since the Treasury Department enforces the Narcotics Act—through violation of which a major portion of the underworld bankroll is made—it is easy to see why the boys can't turn in honest reports of dishonest profits.

### Treasury Hounds Mob

The Syndicate likewise is involved in a big way in smuggling and counterfeiting, which also come under the authority of the Treasury. It is deep in dealings with alcoholic beverages, both bootleg and legal, and the enforcement agency looking into such activities is the Alcoholic Tax Unit—another branch of the Treasury.

The A.T.U. also enforces the Federal Small Arms Act, covering Tommy guns and sawed-off shotguns, tools of the gangsters' trade.

The Syndicate, in trying to figure out what to do with its ill-gotten wealth, was told that the only way to get any use out of its money was to invest it in legal enterprises. Then, after a while, the members could enjoy the spending of the legal dividends which these investments paid. Thereupon, the underworld began to make tremendous investments in a variety of legitimate undertakings. Some were made directly by Costello and the Fischettis in their own names. Others were made for their accounts.

By far the greatest part of the gangsters' holdings in legitimate business are made through highly regarded investment houses, trust companies, real estate agencies and in whose account they are buying property. A bank does not turn down a stranger who comes in with a million dollars in cash and asks the bank to invest it for him.

### Syndicate Sets Up Maze

When the Syndicate selects these agents it sends go-betweens, possibly ten times removed from the main source. By setting up a maze of holding companies and interlocking directorates and private corporations—as many as a thousand—it is almost impossible to trace to its source the ownership of any property in which the Syndicate is interested.

The Intelligence Unit of the Treasury Department, which is the hush-hush, super-police agency assigned to break cases which are beyond the capabilities of other Government cops, is well aware of the magnitude of the underworld's investments. Getting enough evidence to prove it beyond a reasonable doubt to a jury of twelve men is another thing.

It took the Intelligence Unit years to unravel Al Capone's complicated structure before sending him up. And that was simple, compared to today's task. Capone was a local boss. The Syndicate is world-wide.

### Mob Owns N. Y. Skyscrapers

The Syndicate owns a controlling interest in three of the most important hotel chains in the country. It owns two of the largest clothing chains in the nation. It is interested in a department store group. It owns hundreds of blocks of prime real estate in major cities, including skyscrapers on Wall Street and Fifth Avenue in New York; valuable frontage on Michigan Boulevard, State Street and Lake Shore Drive in Chicago, and some of the cream of Los Angeles and Beverly Hills property.

cago's North Side. The world Syndicate owns a trans-Atlantic steamship line of foreign registry, and is busily engaged in building hotels and guest-houses throughout Latin America—some already opened. It has great holdings of movie stock and owns many motion picture theaters.

In many cities, the laundry business is controlled by the Syndicate. One of its most lucrative operations in many key cities is automobile dealer franchises. It owns chains of gasoline stations, restaurants, taxi companies, bus lines, and has broken into the railroad business. The Syndicate has bundles of stock in the Hudson and Manhattan Tubes, connecting New York and New Jersey. The Tubes own the valuable twin Hudson Terminal Buildings in New York's financial district.

### Boys Boss Chorines

Along the line the Syndicate is interested in the operation of night clubs—many because of their tie-up with gambling casinos—and others because the boys like to be big shots, boss chorus girls around and get prime ringside tables.

Even with all these holdings, the Syndicate leaders still find they are embarrassed by having too much cash. They take it in too quickly to invest it wisely. Moreover, they encounter obstacles that discourage the operation of a well-organized business empire.

When a meeting of the board of directors of the Standard Oil Company of New York is called, it is held in offices at No. 26 Broadway. But the Syndicate, perhaps richer than Standard Oil, can do no such thing. Its big shots must hold their meetings on the fly. They are afraid to trust public communication systems for really important matters.

To make personal contacts, they are embarrassed by the fact that

(Continued on page 19)

bling industry, nationally operated and controlled, has unlimited resources necessary to fend off vice crusades.

# Aided by politicians, Chicago's crime branch is nerve center

if they set up regular headquarters, it would be possible for suspicious dicks to watch them going in and out, and thus tie up all gangsters with each other. Furthermore, there are laws, though seldom enforced, which make it a crime for two or more known criminals to consort. A reform administration, intent on breaking the mobsters en masse, could throw the book at them on this alone.

The Illinois Vagrancy Law provides that if two or more known gangsters are seen consorting, they can be sent away for six months. Cook County State's Attorney Boyle, before his election, wrote a letter which we have seen. In it he solemnly promised to drive the hoodlums out of Chicago through the use of this weapon.

### Official Begs Off

As yet, it has not been used once. And when queried by a newspaperman, the official asked plaintively, "Why do you try to embarrass me?"

Because of the airtight tie-up between vice and politics in Chicago, this branch of the Syndicate is not only one of the most profitable, but is also probably the most powerful. There has always been an unholy affiliation between crime and politics in Chicago, as far back as 1871.

It remained for the Capone mob, bent on organization on a new scale, to take over all of Chicago. During the Capone era, today's Midwest czar, Charlie Fischetti, came up through the ranks—starting as bodyguard for his cousin, Al Capone himself. Fischetti built up strong political connections, which were useful when he had brushes with the law for everything from murder to white slavery.

### Cops Bond Backwards

Charlie and his brothers, Rocco and Joe, met prosperity around the corner when they got control of all the rich North Shore gambling places. They found Lake County authorities co-operative. Special trains and busses hauled the suckers to the "games of chance."

Police even arranged to set up road-blocks. Then if the signal was flashed that a Fischetti casino had been held up, rival hoodlums could be snared while trying to make a getaway.

Today, the situation in Chicago is unique and baffling because there is no "opposition." In every other machine-manipulated municipality, there is an aggressive minority party—an active "reform" movement of some proportions. In Chicago, there is none.

### Peace at Any Cost

The Republicans, who long owned the county and state, now depend for sustenance on reciprocal deals. Their line: We mustn't offend our foes, because we'll need them. So we'll keep it peaceful; no mud now, boys, or we get nothing.

Mobsters become more brazen and more open every day. Their money has purchased immunity from the law. Time and again, honest Federal agents find evidence against them. But regardless of who is sitting in the main offices, no prosecution can pierce the barriers of dough and drag.

The forces battling crime are stymied. There just is no recourse against injustice. There is no place, no person to whom the helpless who would appeal can go. The blind alley of politics-gangdom-graft ends in a solid wall, which none may crack or vault.

END

to accept service of process on behalf of Cowles Magazines, Inc. and no agency relationship of any kind exists between the two corporations.

The American News Company has conducted business as a wholly independent organization since 1864.

(S.) Guy King.

Subscribed and sworn to, before me, this 6th day of July, 1950. (S.) Michael J. Kilfeather, Notary Public, State of New York. No. 30-2112700. Qualified in Nassau County. Cert. filed with New York County and Register. Term expires March 30, 1951. (Seal.)

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EXHIBIT C TO MOTION

STATE OF NEW YORK,
County of New York, ss.:

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal, do hereby certify that Michael J. Kilfeather, whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioner and sworn and [fol. 28] qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his official character, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof or deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 7th day of July, 1950.

Fee Paid 25¢.

(S.) Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County. (Seal.)

STATE OF FLORIDA,
Office of Secretary of State, ss.:

I, R. A. Gray, Secretary of State of the State of Florida, do hereby certify that the records of this office show that The American News Company, a corporation organized and existing under the laws of the State of Delaware, is authorized to transact business within the State of Florida.

[fol. 29] I further certify that, according to the records of this office, this corporation has designated 508 Consolidated Building, Jacksonville, Florida, as its place of business or domicile for the service of process and has named The Corporation Company as its agent to accept service of process.

I also further certify that this corporation has filed in this office its corporation capital stock tax reports as provided in Chapter 14677, Laws of Florida, Acts of 1931, as amended, and has paid its corporation capital stock tax due to date, and its Permit is in full force and effect.

Given under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the 8th day of July, A. D. 1950.

(S.) R. A. Gray, Secretary of State.

Certificate of Service

Loftin Anderson Scott McCarthy & Preston hereby certify that copies of the foregoing Motion to Dismiss, the affidavits of Marvin C. Whatmore and Guy King attached thereto, and the Certificate of the Secretary of State of Florida attached thereto, have been furnished to:

Vincent C. Giblin and David Drucker, 804 Ingraham Building, Miami 32, Florida, attorneys for the plaintiff, [fol. 30] by registered mail, return receipt requested, this 10th day of July, 1950.

(S.) Loftin Anderson Scott McCarthy & Preston,
(S.) Will M. Preston.

STATE OF FLORIDA,
County of Dade, ss.:

I. E. B. Leatherman, Clerk of the Circuit Court for the County of Dade, State of Florida, Do Hereby Certify that the foregoing pages 1 to 30, inclusive, contain a copy of all papers, records and proceedings filed in this Court in the case of "Al Polizzi, Plaintiff, vs. Cowles Magazines, Inc., a corporation, Defendant" and a true and correct recital and copy of all such papers, records and proceedings in said cause as appears from the records and files in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said Court this 11th day of July, 1950. E. B. Leatherman, Clerk of the Circuit Court of Dade County, Florida. By C. P. Whitman, D. C. (Seal.)

Sat. Jul. 1, 1950.
Wed. Jul. 5, 1950.

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[fol. 31] IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

[Title omitted]

DEPOSITION OF RAYMOND J. JENNINGS TAKEN BY PLAINTIFF

STATE OF FLORIDA,

County of Dade, ss.:

The examination of a witness on behalf of the plaintiff pursuant to notice (copy of which is annexed hereto), beginning at eleven o'clock a. m. on the first day of July, A. D. 1950, at Room 808 of the Ingraham Building, Miami, Florida, before the undersigned, Boston Lunz, a Notary Public for the State of Florida at Large, in a certain cause now pending in the Circuit Court in and for Dade County, Florida, wherein Al Polizzi is plaintiff, and Cowles Magazines, Inc. is defendant, at which examination there were present Vincent C. Giblin, Esq. and David Drucker, Esq. appearing on behalf of the plaintiff, and Louis M. Jepeway, Esq., appear-

ing on behalf of the plaintiff, and Louis M. Jepeway, Esq., appearing on behalf of the witness, Raymond J. Jennings.

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[fol. 32] RAYMOND J. JENNINGS a witness produced by the plaintiff pursuant to Chapter 24041, Laws of Florida, 1947, being first duly sworn, deposes and says as follows:

Direct examination.

By Mr. Giblin:

Q. Will you state your name, please?
A. Raymond J. Jennings—J-e-n-n-i-n-g-s.
Q. State——

Mr. Jepeway: Now at this point—My name is Louis M. Jepeway. I represent Mr. Jennings.

Mr. Giblin: Will you state who the other gentleman is in the room?

Mr. Jepeway: Yes. Mr. Jennings informs me that the subpoena requiring him to appear and testify this morning at eleven o'clock was not served on him but was left at his home and with his wife last evening at about 7:30 o'clock. He did not learn of it until thereafter. He telephoned me this morning at my office at 9:29 o'clock a. m. I had three appointments between 9:30 and 10:30 this morning, and was unable to see him until twenty minutes of eleven this morning at my office. On his behalf and as his attorney I have informed him that in my opinion the time of notice was inadequate and too short, particularly in view of his statement to me that he has been very busy and this takes him away from his business without any notice in order to prepare for it. We object, therefore, first because of the [fol. 33] inadequacy and insufficiency of the notice. We object, secondly, to the place of the taking of the deposition. I wish the record to show that the place is the office of counsel for the plaintiff. The deposition should be taken in what is, in effect, neutral territory. And on my directions, we decline, respectfully, to testify further at this time, freely and voluntarily submitting ourselves for interrogation at a later suitable time. Now just a minute—and off the record—

Mr. Henshaw is your associate with the American News Company?

The Witness: Yes.

Mr. Jepeway: He is just here to keep you company?

The Witness: I thought as we went further, with my vacation coming up, maybe he could take my place.

Mr. Jepeway: I wish to add this, if I may, that immediately prior to coming into this room about five minutes ago I suggested to counsel for the plaintiff that we re-set the time and place so as to be convenient for all of us, which offer was declined.

Mr. Giblin: Well let me make a statement for the record. I wish to direct counsel's attention to the fact that Mr. Jennings has been called as a witness. He is not a party to the action in which the witness subpoena, pursuant to which he has appeared here, was issued. It frequently happens [fol. 34] that a witness is subpoenaed instanter. There is no right of any witness to any specific time of notice that his testimony will be taken. It requires no preparation, or advice of counsel, to tell the truth; and the only party who might properly object to the insufficiency of notice is the defendant corporation—not the witness. He has no right to notice in advance of the taking of his deposition. He might have been properly subpoenaed instanter to appear. And I want to ask the witness what his idea is as to a convenient time. As to place, that is immaterial, it seems to me, and is another matter about which the witness cannot complain, inasmuch as he is not a party to the proceeding. The place is immaterial to me; I don't care if it is taken in Mr. Jepeway's office, or elsewhere. But I want it distinctly understood that the witness is not excused. I want the notary at this time to recess the matter to a definite future time.

Mr. Jepeway: Off the record——

Mr. Giblin: I don't want anything off the record.

Mr. Jepeway: I am just going to ask him what his convenience would be. Hold it off, will you?

The Reporter: I think as long as one attorney wants me to, I should continue writing.

[fol. 35] Mr. Jepeway: Mr. Jennings, as I understand it, in your business you are particularly occupied by reason of

the imminence of the Fourth of July holiday, is that right?

The Witness: Yes; we have to maintain our routing and make our distributions as best we can.

Mr. Jepeway: You are in the magazine distributing business?

The Witness: Yes.

Mr. Jepeway: When is the first convenient free day without working an undue hardship on you?

Mr. Giblin: Well are the Court and counsel and the parties to be governed by the convenience of witnesses?

Mr. Jepeway: No; but I am trying to get an answer to your question.

Mr. Giblin: Mr. Lunz, you set a definite time, and if he isn't here I'll see if I can't force him to be here.

Mr. Jepeway: We will be very happy to appear at a reset time.

[fol. 36] Mr. Giblin: How about next Wednesday at ten o'clock in the morning?

Mr. Jepeway: I have an eleven o'clock contested——

Mr. Giblin: I don't give a damn what you have; I'm not suiting my convenience and the rights of my client in this case to your——

Mr. Jepeway: I was just going to suggest 9:30 Wednesday morning instead of ten.

By Mr. Giblin:

Q. Now Mr. Jennings, is Mr. Briardy still in the city?

A. Mr. Briardy left yesterday. He is in Daytona Beach today.

Mr. Giblin: I am asking the notary to adjourn this hearing to a future definite day and hour. And I by no means waive, or intend to waive, my right to cite this witness for contempt of Court for refusal to submit to the taking of his deposition today pursuant to the subpoena warrant to which he appears here today.

Mr. Jepeway: May I ask the notary where the recessed hearing is to take place?

[fol. 37] The Notary: I will consult the pleasure of both counsel in the matter.

Mr. Giblin: I am agreeable, insofar as that matter is concerned, to have it taken any place.

Mr. Jepeway: May I suggest the notary's office?

Mr. Giblin: That is agreeable with me. It will be adjourned until Wednesday morning at 9:30 in the notary's office.

Mr. Jepeway: And where is your office, Mr. Lunz.

The Notary: 1414 duPont Building.

Mr. Jepeway: That is July 7th—Would that be the 7th?

Mr. Giblin: The 5th.

Mr. Jepeway: The 5th—that's what I meant to say. Now take this by me; Mr. Jennings will appear and testify at that time and place.

(Thereupon, at 11:15 o'clock a.m. an adjournment was taken in the taking of this deposition until the hour of 9:30 [fol. 38] o'clock a.m. on Wednesday, July 5, 1950, same to be resumed at Room 1414 of the duPont Building, Miami, Florida.)

(The taking of the deposition of Raymond J. Jennings was resumed at Room 1414 duPont Building, Miami, Florida, at 9:30 o'clock a.m. on Wednesday, July 5, 1950, pursuant to adjournment on Saturday, July 1, 1950. Appearances same as heretofore noted.)

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Raymond J. Jennings, a witness produced by the plaintiff pursuant to Chapter 24041, Laws of Florida, 1947, having been previously duly sworn, deposes and says further as follows:

Direct examination.

By Mr. Giblin:

Q. Mr. Jennings, do you know where Look Magazine is printed—that is, where the printing of the magazine itself takes place?

A. I am not certain: I think, Chicago.

Q. Will you explain, please, the method of distribution and sale of that magazine in the State of Florida?

A. Well, the territory which I cover is only from Key West to Fort Lauderdale, and I would have to confine myself, to make any accurate statements, to that territory.

Q. What is your principal place of business in that territory from Key West to Fort Lauderdale?

A. Miami.

Q. And where are the magazines delivered in your territory—at what point are they received?

A. At our warehouse.

[Vol. 39] Q. Where is that?

A. 2200 Northwest First Avenue.

Q. Now what is the point of origin of those magazines that are received at that warehouse?

A. Chicago.

Q. To whom are they addressed, or directed, when received here?

A. They are labeled to the American News Company, Miami Division.

Q. And the American News Company, I presume, is a corporation, isn't it?

A. Yes.

Q. Is it the distribution agent through the State of Florida for Look Magazine?

A. I cannot name other wholesalers, but we definitely do not have the whole state.

Q. But you do have the territory you have named, which includes Dade County?

A. We wholesale copies in Dade County, and Broward and Monroe Counties.

Q. Now when you say you wholesale copies you distinguish customers such as newsstand operators and hotel lobby operators, from those who receive their magazine directly by mail—subscribers.

A. Yes, sir. They are my customers; they are retail outlets, and I am the publisher's customer.

Q. Do you have anything whatsoever to do with the distribution of the magazine to subscribers who receive it directly by mail?

A. In a few isolated cases—we have a subscription department that might have sold some subscriptions in the course of a year. We will clear a subscription in the magazine that we get an order for.

Q. Do you do any solicitation of business—that is, from the individual subscriber who receives by mail rather than through your company?

[fol. 40] A. No, sir. We only clear subscriptions for our own dealers who are on our regular dealers list and have established accounts with us.

Q. Now who does the solicitation of subscriptions—for instance, who comes to my house, or to my office, to solicit subscriptions?

A. That would be a salesman for outfits in the subscription business, such as Periodical Sales Company has one here, and P. F. Collier Company—they work this territory—their office is now in Jacksonville.

Q. Do you know who the soliciting agents are in this territory for Look?

A. Well, those two I am quite sure list any prominent magazines, so that would include Look. A subscription agency usually works just as many magazine as they can get contracts with, I suppose.

Q. Is your company authorized, if it wishes, to solicit subscriptions for the magazine?

A. That I don't know—for this reason: My instructions—and I am confined to clearing orders given to me by our regular news dealers—If an individual came in and wanted to go out and ring doorbells and clear through me, we wouldn't accept his business.

Q. Well suppose I should come to you and wish to subscribe to Look Magazine, would you take the subscription?

A. No, sir.

Q. Why?

A. That would be a retail sale.

Q. What would you do with such a prospective customer?

A. We would send him to a news dealer.

Q. That is, one of the retailers to whom you furnish magazines?

A. Yes, sir.

[fol. 41] Q. Does Look Magazine pay any compensation for the procurement of such a subscription?

A. Yes; the news dealer would make a profit——

Q. And you, in turn——

A. —and we would make a profit.

Q. Of what state is the American News Company a corporation?

A. Delaware.

Q. Its principal place of business being; I presume, in New York City?

A. Yes, sir.

Q. And in what capacity do you serve that company?

A. I'm just the local manager of the Miami office.

Q. Do you have any offices or employees under your supervision as local manager?

A. I don't understand the "offices."

Mr. Jepeway: Did you say "offices"?

By Mr. Giblin:

Q. Well, do you have anyone who is an employee of the American News Company who is under your supervision as local manager?

A. Yes, sir; we have approximately thirty people on our local payroll.

Q. Now why do you need so many people—what do they do, generally speaking?

A. They keep book-keeping records of our accounts; they have to break down the large assortments of magazines that come in, and make up individual orders for the dealers, and another group delivers them.

Q. To shorten it, the fact is that the American News Company handles several, if not many, magazines other than Look?

[fol. 42] A. Oh yes; around four hundred.

Q. And if your work was confined to the distribution and sale of Look only, you wouldn't need such a large force, would you?

A. No, sir.

Q. Now on what basis does Look Magazine pay your company, the American News Company, for acting as its distribution agent in this territory?

A. I can't answer that. I would like to explain how it is handled.

Q. All right.

A. I buy my magazines from the American News Company's what we term "Home Branch" in New York. My invoices come from there. And anything between them and the publisher, I don't know about.

Q. But you know generally—I'm not interested in dollars and cents—I just want to know if it is not true that Look Magazine pays the American News Company on the basis of copies distributed and sold in any given area.

A. No, sir, I wouldn't put it that way. We buy these magazines the same as any wholesaler buys whatever he is wholesaling—the same as tobacco jobbers buy their cigars—and re sell them. We buy them on open account, and I presume there's a time limit on the bills—they are probably paid before we get all our money in. I surmise that.

Q. Do you know whether or not there is a written contract between the publisher of Look Magazine, Cowles Magazines, Inc., and the American News Company?

A. No, sir, I do not.

Q. Would I be privileged to open a newsstand in Miami, Florida, or in Coral Gables, Florida, and sell Look Magazine at retail without getting the magazine from you or through your company?

[fol. 43] A. I would say no.

Q. Why? Because you are the exclusive distribution agency to retailers?

A. Well, our magazines are exclusive. In other words, the other wholesaler here would not be able to buy Look. I am not, for instance, able to buy The Saturday Evening Post.

Q. Who is it that handles Collier's in this territory?

A. We do.

Q. You are familiar with the Caldwell suit against Collier's?

A. Yes, sir, sketchily; I didn't keep up with it too well. I understood that he eventually won the suit.

Q. Do you know on whom service of process in that suit was obtained?

A. Yes, sir.

Q. On whom?

A. B. S. Meade, the Collier's representative in Florida.

Q. Does Look Magazine have such a representative in Florida?

A. Their representative covers possibly four states; I think it's four states.

Q. What is his name?

A. P. T. Briardy.

Q. Do you know whether or not he is in the State of Florida?

A. No, sir, I don't. As I told you Friday——

Mr. Jepeway: Saturday.

A. —Saturday morning, I know that he left Thursday and expected to arrive that night at Daytona Beach, and that's all I know about it; that's the last I heard about it.

[fol. 44] By Mr. Giblin:

Q. Do you know whether or not he knew of the institution of this action, in which your testimony is being taken, before he left Miami?

A. No, I do not. The only reason I know that much about him was that I called his sister's home—I didn't know where he was—what his hotel was, or where he was staying. His sister lives here, and I called to inform him of this business in connection with the magazine and asked him if he wanted to possibly come down with me; and she told me that he left Thursday and would be in Daytona Beach that night.

Q. Do you know who is the president of Cowles Magazines, Inc.?

A. No, sir, I believe it's one of the Cowles, but I can't tell you which one. It appears on the masthead of any——

Q. He's not in the State of Florida?

A. No, sir.

Q. Do you know whether Cowles Magazines, Inc. has any vice-president in Florida?

A. No, sir; to my knowledge, they do not.

Q. —or any other corporate head?

A. No, sir.

Q. Do they have any general manager in Florida?

A. No, sir.

Q. Any cashier, secretary, or treasurer?

A. No; the only person that ever contacts me is what they term their district manager for several states, and that's this fellow Briardy at the present time.

Q. Where does he spend most of his time?

A. Normally he would spend the greatest part of it, I'd say, in Atlanta; that is the biggest city in his territory.

[fol. 45] Q. To what point do you usually address his mail when you write to him?

A. I don't write to him.

Q. You never have occasion to write to him?

A. No, sir.

Q. Did you ever have occasion to call him on the phone?

A. No.

Q. Do you know whether he maintains any office within the State of Florida?

A. I'm quite sure he doesn't. He travels by car and lives in hotels.

Q. Do you know where he lives while he is here—what hotel he stops at?

A. No. No. During his last visit I don't know where he stayed. His mother lives here, and his sister; and occasionally he has called me from the Alcazar Hotel—that's where he would normally go—but sometimes he stays with his family.

Q. Do you know of any other person, aside from Briardy, who is an officer, agent, or employee, of Cowles Magazines, Inc. in the State of Florida, who is not connected with your company?

A. No, sir. To the best of my knowledge, there is no one. Taking Crowell, for instance—that's Collier's—they have this Mr. Meade that covers the state, and they have a city representative here. But they have more magazines to work with.

Q. Who is the city representative?

A. Of Collier's? James Hair. I don't know his initials.

Q. Where is his office?

A. He works out of my office. He keeps files and things at his home. He will come in my office in the morning and maybe get off a deal with us and go out and check newsstands.

[fol. 46] Q. Where is your office?

A. At 2200 Northwest First Avenue.

Q. And where is his home—do you know?

A. I don't know his residence address.

Q. Does he have a telephone?

A. Yes. Now he is connected with Collier's—I'm just using him as an example.

Q. He works, I presume, under Meade?

A. That's right.

Q. Do you have an occasional visit from anyone connected with Cowles Magazines, Inc. in New York City?

A. No, sir; the only one that ever calls on me—None of the Cowles—no executive has ever called, even as a tourist or visitor on vacation—would be this district manager, Mr. Briardy. And then usually they have a supervisor of several of those fellows. I haven't had one of those since before the war.

Q. How long have you acted as local manager of the distribution company, the American News Company?

A. I've been here since June of 1934.

Q. Throughout that period of time has your company been distributor of Look? I don't think it was in existence at that time.

A. It wasn't in existence until about 1938, I think.

Q. But since it came into existence you have been the distributor?

A. Yes, sir.

Q. Now throughout that period of time have you ever received any complaints about or in connection with distribution from Cowles Magazines, Inc.?

A. By complaints do you mean editorial content?

Q. No.

A. You mean——

[fol. 47] Q. Where somebody complained about he didn't get enough magazines, or they arrived in bad shape, or anything of that kind with reference to distribution.

A. The man in Mr. Briardy's capacity might go about the city and check newsstands and find what he considered insufficient display, and bring me a list of the places where he would like to have it improved.

Q. And then pursuant to his suggestions you would carry them out if you can?

A. Yes, sir. I would like to qualify that a little bit: We would carry them out where we thought they would improve the sales. Sometimes those fellows are strangers in town, and we have reasons for trying to put them our way, and we don't always agree with their opinion.

Q. You are both interested in serving the interests, that is, the sale of the most copies possible of the magazine, and

if he makes a suggestion you don't like you wouldn't carry it out if you thought it wasn't a good one?

A. That's right.

Q. Well, necessarily complaints or suggestions of that kind, they would have to come to you, or your company, because there is no other distributor who supplies the retail trade?

A. That's right; yes, sir.

Q. Did you receive personally the—I'm not talking about the witness subpoena now, but the original summons in the case?

A. Yes, sir.

Q. The deputy handed it to you?

A. Yes.

Q. You still have it?

A. No.

Q. Did you send it to Cowles Magazines, Inc.?

[fol. 48] A. No; I sent it to my New York office.

Q. Was it addressed to any specific individual in your company?

A. I can't remember. I think it just had the company name on the top. Do you recall, Mr. Jepeway?

Mr. Jepeway: Except that you told me you intended to send it to Mr. Eichhorn.

The Witness: Yes. Across the top I think it simply said, "American News Company."

Mr. Jepeway: I think perhaps you misunderstand the question. He wants to know if your envelope transmitting that to New York was addressed to any special individual in the company.

The Witness: Oh, my envelope—Yes, it was addressed to W. N. Eichhorn, Executive Vice-President.

By Mr. Giblin:

Q. Of American News?

A. Yes, sir.

Q. Now while Mr. Briardy was here you showed him the copy of the summons which was left with you, didn't you?

A. No, sir.

Q. He knew that you had been served, because you told him?

A. No. Definitely——

Q. I thought you said a while ago that you had invited him to come with you.

[fol. 49] A. It was my intention—I was accounting for the fact that I didn't know much about his activity.

Q. You called his sis-er and she said he had already gone——

A. Yes.

Q. —but you had intended to talk to him.

A. That's right.

Q. So far as you know, then, he did not know before he left here, and has not learned since, of the institution of this action?

A. Not to my knowledge; no, sir.

Q. Unless he read it in the newspaper.

A. I haven't read it myself. It probably was in there.

Q. Have you ever worked elsewhere than in Florida for Cowles Magazines, Inc.?

A. Well, I only worked for the American News Company in Florida since I have been connected with the magazine business. In Jacksonville I started; in Tampa a few years; and then in Miami.

Q. I mean outside of Florida, you never have been with Look Magazine, in the sale of it or in any other capacity?

A. Oh, no, I've never worked for any publisher.

Q. Is there anything else you want to say in connection with this inquiry the principal purpose of which is to ascertain the method of distribution and sale in this territory of Look Magazine?

A. No.

Q. Incidentally, can you tell me what the volume of sales through retailers is in Dade County, Florida?

A. Well, now, that would naturally vary from issue to issue. The issue in question, I can tell you the approximate sales.

Q. All right, what is it?

[fol. 50] A. I made a note of it.

Q. That's the issue in which there appeared an article entitled, "U. S. Crime—its bosses make millions" something like that—May 23rd issue.

A. I don't particularly expect you to believe this, but I

haven't read that article. When you're busy selling these things you have very little time to read them.

Q. I believe that thoroughly.

A. Since this came up I've been determined to read it, but it's so old I can't find one.

Q. Well, I have a copy of it.

A. It was the 5-23-50 issue, I believe.

Mr. Jepeway: That's right.

The Witness: And the sale was 7597 copies.

By Mr. Giblin:

Q. That's in Dade County?

A. That would be all that I sold out of the Miami office, covering the whole area.

Q. Is there any way you could tell how many of those copies were sold in the City of Coral Gables? I don't expect you to do so now, but could it be determined——

A. It could.

Q. —from your books and records, later?

A. Yes, sir.

Q. Have you any general idea as to whether a large proportion of those sales occurred in Coral Gables?

A. Off-hand I would say no.

[fol. 51] Q. How many retailers do you have in that community selling Look Magazine? Is it sold at Whelan's Drugstore on Ponce de Leon Boulevard?

A. Probably ten Coral Gables addresses.

Q. Does that include Whelan's on the corner of Ponce de Leon and Coral Way?

A. Yes.

Q. And Breeding's, on the same corner?

A. Yes, sir.

Q. I don't suppose you have much hotel sales out there?

A. No hotel accounts in the Gables.

Q. Drugstores and newsstands?

A. Yes.

Q. The newsstand which is at the bus station——

A. Yes.

Q. —it handles Look Magazine?

A. Yes.

Q. And there are about seven others in the City of Coral Gables?

A. Yes.

Mr. Giblin: I believe that's all, Mr. Jennings.

Mr. Jepeway: I want to ask a few questions——

Cross-examination.

By Mr. Jepeway:

Q. Mr. Jennings, the——

Mr. Giblin: Well, for whom do you appear?

[fol. 52] Mr. Jepeway: Mr. Jennings.

Mr. Giblin: You are not privileged to ask him any questions—unless you represent the defendant. If you suggest the question, I will ask it for you.

Mr. Jepeway: Well, I want to ask the question anyhow.

By Mr. Jepeway:

Q. Mr. Jennings, you stated that the American News Company buys these magazines on open account, is that correct?

A. Yes.

Q. Are those bills paid by the Miami office, or the New York office?

A. The New York office.

Q. How do you arrange for credit or refund on unsold magazines?

A. I simply bill them back to the American News Company Home Branch.

Q. Do you happen to know whether they give you a credit, or issue a check for that?

A. They give a credit. The branch is debited for the value of the copies shipped in, and credited for unsold copies.

Q. Then the American News Company is a customer of Cowles Magazines, Incorporated?

A. Yes, sir.

Mr. Jepeway: That's all.

[fol. 53] Re-direct examination.

By Mr. Giblin:

Q. Yet nobody else can distribute it in Florida, or in your territory, other than the American News Company?

A. That's true.

Q. I couldn't do it, if I wanted to?

A. No, not as an individual.

Q. I believe I asked you if you had read—Did I ask you if you knew whether there is a written contract between Cowles Magazines, Inc. and American News Company?

A. You asked that; and I don't know. That would be home office business.

Q. If there is such a contract, you have never seen it, read it, or been informed as to its contents?

A. No; not with Cowles, or any other publisher.

Mr. Giblin: That's all; thank you.

The Reporter: Do you want Mr. Jennings to sign his deposition, or do you waive signature?

Mr. Giblin: Will the witness waive signature?

The Witness: Yes, sir.

Mr. Giblin: I waive it. The defendant hasn't appeared, so——

(Witness excused.)

(Signature waived.)

[fol. 54] Certificate

STATE OF FLORIDA,
County of Dade, ss.:

I, Boston Lunz, a Notary Public for the State of Florida at Large, do hereby certify that pursuant to notice (copy of which is annexed hereto) there came before me on the first day of July, A. D. 1950, at Room 808 of the Ingraham Building, Miami, Florida, and on the fifth day of July, A. D. 1950, at 1414 duPont Building, Miami, Florida, the following named person, to wit:

Raymond J. Jennings who was by me duly sworn to testify to the truth and nothing but the truth of his knowl-

edge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing by me; that the deposition is a true record of the testimony given by the witness; and that submission to, and examination, reading and signing by, the witness of his deposition, were by agreement of counsel for the respective parties, and said witness, waived.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

[fol. 55] In Witness Whereof I have hereunto set my hand and affixed my notarial seal this sixth day of July, A. D. 1950.

Boston Lunz, Notary Public, State of Florida at Large. (Seal)

My commission expires: May 21, 1952.
Bonded by American Surety Co. of N. Y.

On August 7, 1950, Plaintiff's Request for Issuance of Additional Summons, was filed.

Southern District of Florida, Miami Division

Civil Action File No. 3439 M-571-C1.

Al Polizzi, Plaintiff,

vs.

Cowles Magazines, Inc., a corporation, 145 S. W. 21st Rd. Paul T. Briardy, Defendant

Summons—Filed September 8, 1950

Received by U. S. Marshal So. Dist. of Fla. Aug. 30, 1950
R8099 Miami 5.00 Process Record Page Line
United States Marshal Received Sep. 5, 1950.

[fol. 56] To the above named Defendant:

You are hereby summoned and required to serve upon Vincent C. Giblin and David Drucker, plaintiff's attorney, or upon either of such attorneys, the address of each of which is 804 Ingraham Building, Miami (32), Florida, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Edwin R. Williams, Clerk of Court. By (S.) Earle F. Sprigg, Deputy Clerk. (Seal of Court)

Date: August 7, 1950.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Return of Service of Writ

I hereby certify and return, that on the — day of —, 19—, I received the within summons

————————, United States Marshal. By (S.) Lee G. Sanders, Deputy United States Marshal.

Marshal's Fees
Travel —— $ ——.
Service ——

Subscribed and sworn to before me, a —— this day of —— 19 ——.

(Seal)

[fol. 57] Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

Return of the United States Marshal for the Southern District of Florida.

This additional summons was received on August 30, 1950 and was served on the within named defendant, Cowles Magazines, Inc., a foreign corporation, in Dade County, Florida, on August 31, 1950, at 12:35 O'clock in the afternoon of such day, by delivering a true copy hereof, together with a true copy of the complaint filed in the action in which this additional summons was issued, to Paul T. Briardy, as a managing agent of such defendant corporation transacting business for it in the State of Florida, in the absence from such state of the president, of the vice president, of all other heads of such defendant corporation, of its cashier, of its secretary, of its general manager, of all of its directors and of all other officers and resident business agents of such defendant corporation. At the time of the service of summons and complaint Mr. Paul Briardy denied that he was such agent or was transacting business for Cowles Magazines, Inc. in the state of Florida or was a person authorized to accept process for the defendant.

Certified at and in the City of Miami, Dade County, Florida, on August 31, 1950.

Chester S. Dishong, United States Marshal in and for the Southern District of Florida. By (S.) Lee G. Sanders, (Lee G. Sanders), Deputy Marshal.

[fol. 58]

| | |
|---|---|
| Fee | 2.00 |
| Mileage | .36 |
| | 2.36 |

On August 21, 1950, Notice of Taking of Deposition of Paul T. Briardy was filed and a receipt for said notice was acknowledged on the same day.

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEPOSITION OF PAUL T. BRIARDY was filed, in the words and figures as follows—Filed September 5, 1950

STATE OF FLORIDA,
County of Dade, ss.:

The deposition of Paul T. Briardy was taken before me, a Notary Public for the State of Florida at Large, on the 1st day of September, 1950, at Room 627 Ingraham Building, City of Miami, County of Dade, State of Florida, at 2:00 o'clock p. m., pursuant to the provisions of Rules 26, 28 and 30 of the Federal Rules of Civil Procedure, as amended, on behalf of the Plaintiff in the above entitled [fol. 59] action, pending in the above named Court. Vincent C. Giblin, Esq., and David Drucker, Esq., of Miami, County of Dade, State of Florida, appeared as attorneys for the Plaintiff, and Will M. Preston, Esq., and Daniel Paul, Esq., of the firm of Loftin, Anderson, Scott, McCarthy & Preston, Esqs., of Miami, County of Dade, State of Florida, appeared as attorneys for the Defendant.

Mr. Paul: I would like to state that the appearances here on behalf of the defendant are for the special and limited

purpose in taking testimony in connection with the motion to dismiss of Cowles Magazines, Inc. previously filed in this cause, and that it is in no way to be construed as a general appearance; and that all grounds stated in that motion are reserved.

Mr. Giblin: It is stipulated and agreed that the appearance of counsel for the defendant at the taking of this deposition is for the limited purpose stated by defendant's counsel.

---

PAUL T. BRIARDY, being by me first duly sworn to tell the whole truth, as hereinafter certified, testified as follows:

Direct examination.

By Mr. Giblin:

Q. State your name, please.
A. Paul T. Briardy.
Q. Do you mind stating your age?
A. No, sir. Forty-five years of age.
[fol. 60] Q. What is your place of residence?
A. I really have none, Mr. Giblin. I travel out of my suitcase, from town to town. I have no place except a letter drop in Miami, and all other mail in hotels.
Q. In what state do you vote?
A. I don't vote in any state.
Q. When did you last vote?
A. I can't remember just when I did.
Q. Did you vote in the last Presidential Election?
A. No, sir, I did not.
Q. Do you have a family?
A. I have a wife; yes, sir.
Q. Where does she customarily——
A. She travels with me.
Q. Constantly?
A. Constantly.
Q. Did you ever maintain a place of residence in Miami, Florida?
A. Yes, sir, I did.
Q. Until what time?
A. Until June of last year, 1949.

Q. When did you enter the employ of Cowles Magazines, Inc.?

A. The same period; in June of '49.

Q. Do you have relatives in the City of Miami?

A. Yes, sir, I do.

Q. What is your legal residence?

A. I really have none. I am employed by a New York concern, and that is my business address.

Q. What was your employment or occupation immediately preceding the acceptance by you of employment with Cowles Magazines, Inc.?

A. District Manager with the Miami Daily News.

Q. If you don't mind, throughout this deposition I shall refer to Cowles Magazines, Inc. as the defendant corpo- [fol. 61] ration, so that if I mention the defendant corporation you will know that I mean Cowles Magazines, Inc.

What were the circumstances which led to your employment by that company?

A. I had previously had 25 years experience in the magazine business, and I had contacted Cowles in order to get back into the magazine business after being away from it over a year.

Q. What method did you employ for the purpose of making that contact?

A. Well, they had a representative that came down here, and I contacted him at that time, as he was an old friend of mine.

Q. Where was it that you saw him?

A. At the Alcazar Hotel.

Q. Had there been correspondence preceding the conference?

A. None whatsoever.

Q. You learned that he was in the city, and you went to see him?

A. That's right.

Q. And through that conference obtained employment with the defendant corporation?

A. That is correct.

Q. Who was your immediate predecessor who performed for the defendant corporation the duties which you now perform?

A. I never met the gentleman, and have no knowledge of who he was, except by hearsay.

Q. Do you know his name?

A. I understand it was Dave Eckhardt.

Q. In the conference which you had at the Alcazar with a representative of the defendant corporation, were the terms of your employment agreed on?

[fol. 62] A. No, sir.

Q. When were they agreed on?

A. Just prior to my employment by mail.

Q. And mail from the defendant corporation emanated from New York City?

A. That is correct.

Q. Who was the representative with whom you conferred here?

A. Bert Barkas.

Q. In what capacity did he at that time serve the defendant corporation?

A. He is in the capacity of a Promotion Manager, I would say. I don't know his exact title.

Q. If you don't know his title, do you know what his duties were?

A. Yes. If they would have a story that would be worth while to promote through trying to secure free advertising, I mean a write-up in the newspaper, or free radio plugs, or something like that, that is what he works on, as I understand it.

Q. That is what he was doing here in Miami at the time?

A. That is correct.

Q. Did you subsequent to the conference with Mr. Barkas visit the offices of the company in New York, prior to your employment?

A. No, I did not.

Q. From the time of your conference with Mr. Barkas at the Alcazar Hotel, at Miami, until you were employed, the negotiations for the employment were by mail?

A. That is correct.

Q. And with what officer or officers of the company in New York did you cor-espond?

A. With the Circulation Department only.

[fol. 63] Q. Do you know the name of the officer or officers?

A. Yes, sir. My immediate superior, or boss, would be Abner Sideman, Circulation Manager.

Q. Was the correspondence of which you have spoken, with him?

A. The first letter I received was from my friend Bert Barkas, and after that it was through Ab Sideman, the Circulation Manager.

Q. In any of this correspondence were your duties to be performed by you for the defendant corporation outlined or designated?

A. No, sir, they were not.

Q. That was understood and agreed on in oral conferences between you and Mr. Barkas?

A. Yes, with the exception that I had a pretty good conception of what the duties that were required of you.

Q. By whom were you told your duties were to be as an employee of the defendant corporation?

A. Bert Barkas.

Q. In the conference of which you have spoken?

A. That's right.

Q. And there have been no written instructions issued to you by the defendant corporation outlining or specifying your duties?

A. No, sir; that is correct.

Q. What business do you transact for the defendant corporation in the territory you serve, Mr. Briardy?

A. My duties consist of checking retail outlets, to make certain that our magazines are as well displayed as our competition. Also to accept any complaints from our dealers as to our service or the service of the American News Company is not up to par—which I in turn pass on to my own office.

Q. In written reports?

[fol. 64] A. In written reports; yes, sir.

Q. If after your reports are submitted, the conditions which in your opinion need correction, they are not promptly corrected, do you assist in your effort to have them corrected?

A. Yes, I do.

Q. In what territory do you serve the defendant corporation?

A. The State of Florida, South Carolina, Georgia, and only part of Alabama.

Q. In which of those states is the circulation of Look Magazine the greatest?

A. That I don't know. I would have to refer to records for that.

Q. You know, don't you, that it is greater in Florida than in any of the other states included in your territory?

A. No, sir, I do not.

Q. Do you think so?

Mr. Paul: I object to that question.

By Mr. Giblin:

Q. Do you think so?

A. No, I don't believe it is—to be honest.

Q. What state, in your opinion, has a greater circulation of Look Magazine?

A. Of the states I work in I would say Georgia has.

Q. And which state, in your opinion, has the second largest?

Mr. Paul: I object to that question too.

[fol. 65] The Witness: That would be hard to guess. Perhaps Florida.

By Mr. Giblin:

Q. You are not really hesitant in expressing that opinion; you are not at all uncertain about that?

A. I am not positive by any means.

Q. Do you know what the circulation of Look Magazine in the State of Florida has been during the last six months?

A. No, sir, I have no way of knowing unless I had some records to total up and refer to.

Q. Do you have any such records?

A. No. They are available at the American News Company office.

Q. Your function is to increase circulation in this state as well as other states?

A. To the best of my ability.

Q. And you don't know what the circulation is that you are supposed to increase?

A. That is correct.

Q. You don't know it?

A. No. I carry no figures with me, Mr. Giblin.

Q. What is your title, Mr. Briardy?

A. I am what they commonly call a Circulation Road Man.

Q. Do you know Mr. Meade?

A. Stock Meade?

Q. Yes.

A. Yes.

Q. Do you perform duties for your company similar to those performed by him?

A. No, I wouldn't say that we do.

Q. What distinction is there, if you know?

A. Well, he works in the capacity as a District Manager. He has men in his employ, where I do not.

[fol. 66] Q. To be a manager you have to have something or somebody to manage?

A. That's right.

Q. You don't have any somebody?

A. That is correct.

Q. But you have something to manage?

A. I can only suggest to these various operations I call on. I can't dictate to them.

Q. Your suggestion for corrective measures, if you think some should be adopted, are made directly your company?

A. That is true.

Q. How long did you say you have been in the employ of the defendant corporation?

A. Since June of 1949.

Q. And prior to that time?

A. Miami Daily News.

Q. In what capacity?

A. District Manager.

Q. Do you have any employment or source of income from which you receive any salary or compensation whatever other than your employment with the defendant corporation?

A. No, sir, I do not.

Q. What is the basis for compensating you? Are you paid a salary?

A. Salary, plus my expenses on the road.

Q. How do you customarily travel—by plane, train?

A. No, sir; I drive my own car.

Q. What kind of car do you now use?

A. I have a convertible Ford coupe.

Q. Did you own it at the time you accepted employment?

A. No, sir; I had another Ford.

[fol. 67] Q. When did you acquire the Ford which you now use?

A. I bought it at the Automobile Show here, whatever month that was. I believe it was the end of May.

Q. Of this year?

A. This year; yes, sir.

Q. In your conferences with Mr. Barkas, was it understood that you would furnish your own car?

A. Yes, sir.

Q. When you purchased the new car, did you pay for it entirely out of your funds?

A. No, sir, I traded my old car in on it.

Q. No one had contributed to the purchase of the old car, which you traded in?

A. No, sir.

Q. And of the cash or the balance of the purchase price, was there any contribution made?

A. No.

Q. You paid for that entirely out of your own funds?

A. Correct.

Q. It was your understanding and agreement with the defendant corporation when you were employed, that in the performance of your duties for the company, you would use your own automobile?

A. Correct.

Q. The defendant corporation, however, does pay for the gas, oil and upkeep of the car?

A. Well, they gave me a flat rate each week for the use of my car.

Q. What does that flat rate include?

A. I have to carry my own insurance, I pay for my own gas, oil and repairs, new tires, or anything that is required for my car. I keep it up 100 per cent.

Q. What is the flat rate?

[fol. 68] A. $30 per week.

Q. What are your expenses per week for gasoline and oil?

A. That is pretty hard to break down, because I get my $30 a week regardless of whether I am traveling or not.

Q. The $30 a week includes everything incident to your use of that car in the performance of your duties?

A. That is correct.

Q. Oil, gasoline, upkeep, anything?

A. Correct.

Q. That $30 actually is greater than your total expenses of upkeep, is it not?

A. No, I wouldn't say so in view of the wear and tear on the automobile; the fact that I have to replace it out of my own funds.

Q. You are speaking now of depreciation?

A. That's right.

Q. I am speaking of actual expenses.

A. I think I break about even on that because I make some pretty long jumps at times.

Q. Did you recently go to California?

A. On my own vacation; yes, sir.

Q. Did you travel by car?

A. Yes, sir.

Q. Were any of the expenses of that trip defrayed by the defendant corporation?

A. No, sir.

Q. Did you get $30 a week while you were on your vacation?

A. No, sir.

Q. That expense item of $30 per week for car keep was eliminated during your vacation period?

A. Yes, sir—all expenses except salary.

[fol. 69] Q. I don't want you to answer this question if it is embarrassing to you. I would like to know what your salary is. My only reason for asking it is because it may indicate your importance to your company.

A. I have no objection to answering it. $75 a week.

Q. That is exclusive, however, of expenses?

A. Correct.

Q. Do you have any regular or customary routes, or time

of arrival, or schedules that you follow in going about your five-state territory?

A. I try to follow a regular itinerary. In other words, take one town after the other in what would be, you might say, the least mileage; for the simple reason that I cover towns in between where you might say a branch office or wholesaler would be located. In other words, I check dealers in small towns as well as large towns—so that is the most convenient way for me to do it.

Q. Will you detail as accurately as you can, if there is such a thing, a typical day which you spend while engaged in the performance of your duties for your company in the City of Miami, Florida. For example, the time you get up in the morning, until you go to bed at night—detail your customary activities.

A. Well, I would generally start out and cover approximately 40 dealers, 40 stores, that is, that handle magazines, in the course of the day.

Q. By dealers you mean retail venders in whose places of business Look Magazine is displayed for sale and sold?

A. That is correct.

Q. To retail customers?

A. Correct.

Q. When you arrive at one of the 40 dealers in this city, what do you do or say?

[fol. 70] A. Well, I don't have too much to say to any of them if the display is satisfactory. In other words, I go over and I might even count the magazines to have some idea as to how the sale is progressing. Then if our display is not satisfactory, if I can personally adjust the display with the cooperation of the dealer, I do so. By that I mean if the magazines would be buried, whereas they could be a full cover display, which would naturally appeal to the public, I would try to put them in that position.

Q. The object being to increase as much as possible the circulation and sale of Look Magazine?

A. That is correct.

Q. You, of course, contact the operator of the retail place of business to find if he has any complaints as to late deliveries or insufficient volume of deliveries?

A. That's right.

Q. And if he has any complaint as to lack of promptness, or an insufficient number of magazines, that is important to your company?

A. That is correct.

Q. For correction?

A. Correct.

Q. I notice, Mr. Briardy, in many, if not all of these places of business in which Look Magazine is offered for sale to the general public, there are from time to time, if not constantly, advertising displays in addition to the display of the magazine itself. Do you have anything to do with the placing of those advertising displays?

A. Yes, sir; occasionally I put some up.

Q. In these retail places?

A. In the retail stores that will permit a poster to be put up.

[fol. 71] Q. If you put them up where did you get them before you put them up?

A. Well, the American News Company generally has a small supply of them around the place. I can always pick up a few there, and occasionally I get a few sent to me direct.

Q. From your office, from your company in New York?

A. Yes, sir.

Q. Do you have any connection with, or anything whatever to do with the sale to persons who receive Look Magazine through subscriptions at their homes or offices?

A. No, sir, I do not.

Q. Your function deals solely with the retail sale at places of business of Look Magazine?

A. That is correct.

Q. What knowledge have you of any activities in the company's behalf, in the State of Florida, to promote the sale of the magazine to individual subscribers who receive the magazine at homes or offices?

A. None whatsoever. I have no connection what that end of the business at all.

Q. While you are in the City of Miami, Florida, in the performance of your duties for the defendant corporation, and not actually engaged in visiting places of business of retail vendors, do you not spend considerable time in the offices of the American News Company here?

A. I wouldn't say I spend considerable time there. I do spend some time there.

Q. Do you have a desk there?

A. No, sir, I do not. I use one of the American News Company desks, or one of their benches, where I can possibly work—that is not being used.

[fol. 72] Q. You have been seen at the desk there, so I was wondering if you have a desk that is customarily assigned to you?

A. No, sir, I do not.

Q. But the use of a desk is provided you by the American News Company should you desire to use it?

A. Frankly, I make it a point to sit down at any desk I don't find occupied. They don't have any desk assigned to a Circulation Road Man.

Q. What use do you make of the desk?

A. I go over the check-ups that I perhaps have made the previous day, and if I find anything that is radically wrong, I might even speak to the manager about it there, besides the fact that it has been included in my report that went to New York.

Q. At what place in the City of Miami, Florida, do you usually write out the written reports which you submit to the defendant corporation in New York?

A. In my hotel room.

Q. Never at the desk or office you referred to?

A. Not to total them up, or type them, or anything. I have my typewriter at the hotel, where it is typed up.

Q. Do you carry with you a portable typewriter?

A. Yes, sir, I do.

Q. And always do your own typing?

A. No, sir; I have my wife type for me.

Q. She always does?

A. She always does.

Q. When you sign letters or reports which are directed by you to your company in New York, what title do you use beneath your signature?

A. I don't have to use any title. I don't even have to sign my name in full.

Q. I didn't ask you what you have to do; I asked you what you did do.

[fol. 73] A. No, sir. I just sign my letters, "Sincerely, Paul Briardy."

Q. And those reports are addressed to some individual officer of the company?

A. They are directed to Abner Sideman only, Circulation Manager.

Q. He has been the Circulation Manager throughout the period of your employment?

A. That is correct.

Q. Were you served yesterday with a copy of the additional summons issued in this case, together with a copy of the complaint?

A. Yes, sir, I was.

Q. Did you forward those papers to your company?

A. No, sir. I don't know exactly what to do with them.

Q. Until now you have done nothing with them?

A. That is correct.

Q. You have advised your company of their receipt by you, have you not?

A. No, sir, I haven't to date.

Q. Have you advised your company's attorneys of their receipt?

A. Yes, I think they are aware of the fact that I have them.

Q. They couldn't have been aware, probably, unless you told them. You told them; is that correct?

A. Right.

Q. That is the firm of attorneys of which Mr. Preston is a member of the firm of attorneys you told?

A. That is correct.

Q. But you retained possession of the additional summons and complaint, and did not deliver either of them to the attorneys?

[fol. 74] A. That is correct. I have them in my possession.

Q. When these advertising displays are placed in the places of business of retail vendors in the State of Florida —when you are in Georgia or Alabama, or some other place outside of Florida, by whom are they displayed?

A. The majority of posters are put up either by the dealers themselves, or by American News Company drivers.

Q. How does it happen that in some instances when you are here you yourself place them?

A. For the simple reason that I am trying to promote a little additional sales, if possible, by advertising.

Q. Have you ever since you began your employment with the company, made any suggestions to the company or its officers as to methods or means by which you thought that circulation in Florida could be increased?

A. No, sir, I haven't. I have no new ideas on circulation at all.

Q. Have you ever during the period of your employment, submitted to your company reports in which there was incorporated any complaint by the retailers of insufficient number of copies, or lack of promptness in delivery?

A. Yes, sir, there has been.

Q. And after the submission of such reports or suggestions, the conditions complained of or reported by you have been in every instance remedied, have they not?

A. Yes; I would say that they have cooperated with us about 100 per cent.

Q. Have you at any time employed any other person in the State of Florida to assist you in any way, in any effort you were making in behalf of your company, in the performance of your duties?

[fol. 75] A. No, sir.

Q. Not even to the extent of employing any boys or men to place these advertisement displays?

A. No, sir.

Q. Do you know whether or not your predecessor ever did so?

A. That I don't know.

Q. Have you ever heard that he did?

A. No, sir.

Q. What are your instructions as to cooperation by you in behalf of your company, in this and other states, with the American News Company?

A. I don't know just how you mean that, Mr. Giblin.

Q. What has your company or its officers told you to do in cooperating with the wholesaler in this area—the American News Company?

A. I generally receive cooperation from the American News Company to my satisfaction, and I generally cooperate with them. However, they ask nothing from me whatsoever.

Q. What cooperation from them do you solicit?

A. The correction of any displays that we find out of line, or complaints from dealers to see that dealers have sufficient copies, and so forth; and to use whatever advertising material that might be sent them, insofar as putting it on the stands.

Q. The relations between you as a representative of your company, and the American News Company, have always been cordial and mutually cooperative?

A. Correct.

Q. Will you tell me, please, by whom the business and affairs of the Cooper News Company at Panama City are managed?

[fol. 76] A. I would say by Mr. Glen Cooper, with his wife as more or less assistant to him. It is a very small operation.

Q. What territory does the Cooper News Company serve as a wholesaler of Look Magazine?

A. Panama City, Florida, is their base city operation, and they have probably a half-dozen smaller towns that surround Panama City, within a radius of 10 or 15 miles, that they supply *Q. Do you know whene or 15 miles, that they supply.*

Q. Do you know when the Cooper News Company supplanted the American News Company as the wholesaler in the Panama City area?

A. No, sir, I do not.

Q. That was prior to your employment?

A. Yes, sir.

Q. Do you cooperate with the Cooper News Company, and the Cooper News Company with you, in the promotion of circulation of the Panama City area which Cooper News Company serves?

A. Yes, sir, I do.

Q. In the same way with which you cooperate with the American News Company, and it cooperates with you in other sections of Florida?

A. Yes, sir; that is correct.

Q. Is the Cooper News Company a corporation, or do you know?

A. I don't know; but to venture a guess, I think it is privately owned by Glen Cooper.

Q. You think probably it is a trade name rather than a corporate name?

A. That's right.

Q. Does Cooper News Company engage as a wholesaler of magazines in any area other than the limited area in and around Panama City?

A. No, sir. To my knowledge he does not.

[fol. 77] Q. Do you know what peculiar reasons motivated the selection of the Cooper News Company to supplant the American News Company in that area; or have you heard of any?

A. Can I venture a guess on this?

Q. Yes.

A. I would say that the American News Company is very weak in that particular locality. As a matter of fact, they have only one account in that particular area, that I know of, whereas Cooper News Company probably has in the neighborhood of maybe 40 to 45 accounts.

Q. Cooper News Company has been in business in that area for a considerable period of time, hasn't it?

A. I would just venture a guess on that too. I would say probably from five to ten years they have been in there anyway.

Q. In all other sections of Florida, other than Panama City area, the wholesaler of Look Magazine is the American News Company?

A. That is correct.

Q. Does it serve as the wholesaler in the other sections of the five-state territory which you serve?

A. Yes, sir; with the exception of five or six towns.

Q. That is where some local wholesaler is regarded as stronger, because of one reason or another?

A. That's right; more or less in the same capacity as Cooper News.

Q. Mr. Briardy, have you had occasion at any time while on your scheduled itinerary you have been in other sections of your territory, been called back to Florida because of some condition or some emergency?

A. Yes; but not in behalf of Look Magazine.

Q. I am speaking only of business.

[fol. 78] A. I am speaking of business too. We have two other magazines besides Look.

Q. In behalf of your company, nevertheless. It publishes——

A. Flair, Quick and Look.

Q. Will you explain, please, what those occasions were, and what were the circumstances which caused them to arise?

A. Yes. When we first put Flair on the market, which was in February of this year, the fact that it was the Winter season here, and a class publication like Flair which sells for 50 cents, which in all probability would have a very good sale in this town and surrounding area, they thought it would be best I stay in this area to see how the sale was getting along, and make sure it was being promoted properly.

Q. The conditions were regarded by the company at the time as rather unusual, and warranted your leaving where you were, to come to Florida to promote its interests here?

A. That is correct.

Q. What magazine other than Look and Flair does your company publish?

A. Quick.

Q. Each of the three is circulated widely and sold widely in Florida?

A. Yes, sir.

Q. And you perform the same duties as to Flair and Quick as you do for Look?

A. That is correct.

Q. Is the circulation of either of the other two as great in Florida as Look?

A. No, sir.

Q. They are comparatively new, however, are they not?

[fol. 79] A. Yes, sir.

Q. Are you making efforts to build up their circulation?

A. Yes, sir, we are.

Q. In Florida?

A. Yes, sir.

Q. What efforts are you making in Florida on behalf of your company to build up the circulation of Flair and Quick?

A. The same method we use on Look—by seeing it is prominently displayed, and the dealers are properly covered

with it; and that we prevent as many sellouts as we can, as long as the copies will last.

Q. Also to see that the dealers are pleased by prompt deliveries, and provided with a sufficient number of copies?

A. That is correct.

Q. Have there been any discussions between you and any officer, agent or representative of your company as to the establishment for you of permanent headquarters?

A. No, sir.

Q. There has been no discussion of any contemplated change of arrangement which would put you in some office or headquarters where you could spend most of your time?

A. No, sir.

Q. There hasn't been the slightest discussion about that?

A. No, sir.

Q. No correspondence?

A. No, sir.

Q. Does Meade travel about a territory for Colliers?

A. Yes, sir; he has only the one state—Florida.

[fol. 80] Q. His territory is more restricted or limited in area?

A. Yes, sir.

Q. But in the limited area he serves he performs substantially the same function for his company as you do for yours?

A. To some degree, with the assistance of several men that he has.

Q. I understand that the Collier force is much larger, and they have local as distinguished from district managers?

A. That is correct.

Q. You serve a district, where he serves a locality?

A. That's right.

Q. Mr. Briardy, from time to time there appears in Look Magazine the advertisements of Florida advertising. Do you have anything whatso-ver to do with the procurement of such advertisement?

A. No, sir, I do not.

Q. Do you know who, if anybody, connected with the company, comes to this state for that purpose?

A. To my knowledge, no.

Q. Have you heard who it is?

A. No, sir, I never have.

Q. Has your salary been the same from the inception of your employment to date?

A. No, sir; I have had one increase in salary.

Q. How recent was that increase?

A. I would say about six months ago. I don't recall the exact date.

Q. Do you now receive a greater salary for your services for the defendant corporation than you did receive from the Miami Daily News?

A. Yes, sir, I do.

[fol. 81] Q. How long prior to your employment by the defendant corporation had you actually lived in the City of Miami, Florida?

A. Just a little better than a year, I would say; probably 14 months, or so.

Q. From what place had you come?

A. I had come here from Chicago, Illinois.

Q. Were you in the same or any similar line of business there?

*Q. Were you in the same or any similar line of business there?*

A. I was with the American News Company for the 25 years I spoke of as previous experience in the magazine business.

Q. Do you know whether or not you were recommended for your employment by anyone connected with the American News Company?

A. No, sir; but as a matter of course, I offered them as references.

Q. Have you ever personally visited the offices of the defendant corporation in New York City?

A. Yes, sir, I have.

Q. When was your latest visit?

A. They had what they term as a Regional Meeting about six months ago. I would have to verify that period of time, but I believe it was six months ago.

Q. What is done at that Regional Meeting; what is its purpose?

A. That is the old pep talk to get you out in the field and try a little harder, to do a little better promoting, to make sure we understand the job we are supposed to do out there.

Q. State just what they tell you of what you are supposed to do.

A. The same as I have told you before—to try to promote additional sales.

[fol. 82] Q. Are those Regional Conferences held with any degree of frequency?

A. That is the only one I have been to, Mr. Giblin. I have worked for them over a year now.

Q. Have they another scheduled soon?

A. No, sir, not to my knowledge.

Q. There is no regular definite schedule?

A. Apparently not.

Q. Have you ever received during the course of your employment with the defendant corporation any complaint from it or any of its officers as to poor circulation in Florida?

A. No, sir.

Q. Or suggestions for corrections of faulty delivery, or anything of the kind?

A. No, sir, not to my knowledge.

Q. As far as you know, or have been advised, your company is satisfied with the nature and character of the services you have rendered for it?

A. Yes, sir.

Q. And has made no suggestions to you as to what else you could do to promote sales in this state?

A. No; other than every now and then you might get a little pep letter telling you "Let's hit the ball a little harder, and see if we can't cover a little more territory" or something like that.

Q. How do you arrange, Mr. Briardy, for the receipt of your mail? Suppose, for example, a retailer in Miami, Florida, had a complaint. Where would he find you by mail or otherwise?

A. He wouldn't possibly know where to find me or locate me.

Q. He would have to await your arrival, and know that you were here before he could contact you, or else exert some effort to find out where you were?

[fol. 83] A. Yes. But I would say that after all, a dealer wouldn't wait until he would see me. After all, he is doing business with the wholesaler, the American News Company;

and the logical thing for him to do would be get on the telephone and call the American News Company.

Q. When you do get into the city, do you inquire of the American News Company as to any complaints of any kind on the part of retailers?

A. That is correct. If there is something they can't handle themselves, I would try to go out and pacify the dealer, if that be possible.

Q. That has happened?

A. I can't recall when it did, but I know that it has happened in the past.

Mr. Giblin: That is all.

Cross-examination.

By Mr. Paul:

Q. Mr. Briardy, you stated you cover five states in your territory?

A. Yes, sir.

Q. How many other wholesalers besides the American News Company do you deal with in that territory, approximately?

A. I would say six.

Q. In covering this five-state territory, do you try to divide your time more or less equally between the five states?

A. Well, that just depends on the length of time it takes you to get around the territory. In other words, as much as possible, yes. I would say that one wholesaler was just [fol. 849] as deserving of being checked as the next fellow.

Q. How long do you expect to be in Dade County at this present visit?

A. I will probably leave here, I guess, Wednesday or Friday of next week.

Q. When do you expect to return to Dade County?

A. I probably won't be back here until after the first of the year.

Q. You don't expect to be back any more this year?

A. That is correct. I might be back in Florida this year, but I won't be back down as far as here by the first.

Q. Do you have anything to do with selecting these wholesalers in your district?

A. No, sir, I do not.

Q. Do you have any authority to hire anyone for the defendant corporation?

A. No, sir, I do not.

Q. Have you ever hired anyone for the defendant corporation?

A. No, sir, I have not.

Q. Have you any authority to make any contracts or any commitments of any kind for the defendant corporation?

A. No, sir.

Q. Have you ever made any contracts or commitments for the defendant corporation?

A. No, sir.

Q. Do you have any authority to buy anything for the defendant corporation?

A. No, sir.

Q. Do you have any authority to sell anything for the defendant corporation?

A. No, sir.

[fol. 85] Q. You have never bought or sold anything for the defendant corporation since you have been in your present job?

A. No, sir.

Q. Do you have anything to do with the physical handling or distribution of any of the magazines published by the defendant corporation?

A. No, sir.

Q. Is there any reason, as far as the defendant corporation is concerned, why you should live in any particular state in your territory?

A. No, there is no reason.

Q. You could just as well live in Alabama as in George?

A. Correct.

Q. Or in Florida?

A. Correct.

Q. You stated that you received a straight salary, and reimbursement for your traveling expenses?

A. That is correct.

Q. Do you receive any commission of any kind?

A. No; no commission whatsoever.

Q. Do you have any authority to give any directions to any wholesaler?

A. No. I can make suggestions to them, but I can't compel them to do anything.

Q. If any particular wholesaler was not distributing magazines for the defendant corporation as you think they should, do you have any authority to cut off that particular wholesaler?

A. No, I do not.

Q. You have no authority to cancel any shipments to that particular wholesaler?

A. No, I do not.

[fol. 86] Q. Do you have anything to do with placing any advertising in newspapers?

A. No, I do not.

Q. For the defendant corporation?

A. No.

Q. Con you spend any of the company's money?

A. No, I cannot.

Q. Do you have any listing in any telephone or directory under the same of the defendant corporation, or of any of the publications in any of the five states that you cover?

A. No, I do not.

Q. You have no listing in Miami or Dade County?

A. No, sir.

Q. For the defendant corporation, or its publications?

A. No, I have not.

Q. As far as you know does the defendant corporation have any office in the State of Florida?

A. To my knowledge, no.

Q. As far as you know does the defendant corporation have any agent or other employee besides yourself in the State of Florida?

A. No, they have not.

Q. Do you have any property or bank accounts in the name of the defendant corporation in the State of Florida?

A. Not to my knowledge.

Q. Do you keep any books or records that belong to the defendant corporation in the State of Florida?

A. No; except that when I am in the town that I am working, I may have a few records right while I am there; but the records are kept in the individual wholesale offices.

[fol. 87] Q. Those are the personal records you make up your reports from?

A. That's right.

Q. Does the defendant corporation request you to keep any permanent records?

A. No, it does not.

Q. Do you have any knowledge of what agreements the defendant corporation has with these various wholesalers with which you deal?

A. No, I do not have knowledge of the entire setup by any means.

Q. Have you ever sold any advertising for the defendant corporation?

A. No, I never have.

Q. Have you sold any subscriptions for the defendant corporation?

A. No, I never have.

Q. Do you have anything whatsoever to do with subscriptions?

A. Nothing whatsoever.

Q. Are you an officer or director of the defendant corporation?

A. No, sir, I am not.

Q. At what address do you get your mail and your pay check from the defendant corporation?

A. Depending on where I am at, as per my itinerary, and the various hotels I stay in in the five states I cover.

Q. Your mail from the defendant corporation goes to whereever you happen to designate in your itinerary?

A. That is correct.

Q. Have you ever had any summons or legal process served on you before in behalf of the defendant corporation?

[fol. 88] A. No, sir, I haven't.

Q. Do you have any instructions from the defendant corporation as to what you should do if any officer should attempt to serve any legal process on you on behalf of the defendant corporation?

A. No, sir, I have not.

Q. The summons which was served on you in this case is the first instance since you have been working for the

defendant corporation in which process has been served on you on b-half of the defendant corporation?

A. That is correct.

Mr. Paul: We have no further questions.

Redirect examination.

By Mr. Giblin:

Q. Mr. Briardy, as I understand from your answer to one of Mr. Paul's questions, you have no authority or instructions to order any wholesaler—the American News Company, or any other—to do anything; but what you do is offer suggestions as to any remedial methods which should be adopted; is that correct?

A. That is correct.

Q. If the suggestions as to remedies, however, are not adopted and followed by the wholesaler, you report the matter to the home office for its consideration and action?

A. I report the action regardless of whether it is corrected, or not.

Q. Well, in the event it is not corrected by the wholesaler, you keep your company advised of the failure of the wholesaler to correct it?

[fol. 89] A. That is correct.

Q. Have you ever suggested to your company, or requested it to furnish you with any help in the way of subordinate employees?

A. No, sir, I never have.

Q. Have you ever felt the need for such assistance?

A. No, sir, I never have.

Q. You feel that you adequately perform the function for which you were employed by your company?

A. Yes, sir.

Q. And don't need any help?

A. That is correct.

Q. In the State of Florida, there are, of course, a number of cities other than the cities of Miami and Miami Beach which you visit?

A. That is correct.

Q. In this area there are approximately 40 dealers that you visit, as I understand.

A. In what area is that?

Q. Miami area?

A. Forty dealers?

Q. Yes.

A. That is approximately what I would cover in one day.

Q. There are more dealers than that which you visit in this Miami area alone?

A. That is correct.

Q. Do your duties take you to Key West?

A. I have been to Key West once in the past year.

Q. To Fort Lauderdale?

A. Yes, sir, I have been to Fort Lauderdale.

Q. How many dealers, approximately, are there there that you visit?

A. I would probably check 25 dealers in the City of Fort Lauderdale.

[fol. 90] Q. You have stated that you visit about 40 here a day and you say you will be finished here by next Wednesday. What, approximately, as nearly as you can estimate it without examination of records, is the total number of dealers in the Greater Miami area, consisting of Miami, Miami Beach, Coral Gables, and other communities?

A. I would almost have to check that.

Q. They run well over a hundred?

A. That is correct; there would be over a hundred dealers.

Q. Do you visit Hollywood?

A. Yes, sir.

Q. Fort Lauderdale?

A. Yes, sir.

Q. Delray?

A. Yes, sir.

Q. West Palm Beach?

A. Of course, that comes under a different heading there. That is a different operation in West Palm Beach. That is another American News Company branch. They come down where Miami lets off supplying dealers. They take in that territory.

Q. You, however, visit that area as well?

A. That is correct.

Q. And Daytona Beach?

A. Correct.

Q. Orlando?

A. Correct.
Q. Jacksonville?
A. Correct.
Q. St. Augustine?
A. Yes, sir.
Tallahassee?
A. Yes, sir.
[fol. 91] Q. Pensacola?
A. No. Pensacola is not in my territory.
Q. In whose territory is that?
A. That is covered by a Circulation Road Man who makes his headquarters, I believe, at New Orleans. I am not positive of that; but it is not in my territory.
Q. But he visits that territory?
A. Yes; in the same capacity as I visit my territory.
Q. Then the company does have an employee performing work for it in the State of Florida, other than you?
A. Yes; but he does not work for me. He is another man.
Q. Do you visit Tampa in the performance of your duties?
A. Yes, sir.
Q. St. Petersburg?
A. Yes, sir.
Q. Clearwater?
A. Yes, sir.
Q. Sarasota?
A. Yes, sir.
Q. And several other communities which I have not named?
A. Yes, sir; in the territories that you have mentioned.
Q. That is why you don't spend any considerable length of time in any one locality, but move from place to place in performing your duties?
A. That is correct.
Q. And in the course of a year, while you don't spend any month or two months in Miami, Florida, you do spend considerable time in the State of Florida in the various communities of the state?
A. That is correct.
[fol. 92] Q. And your time is pretty well proportioned among the five states which you serve?

A. That is correct.

Q. Florida receives its proportionate share of the benefit of your services?

A. Yes, sir.

Mr. Giblin: That is all.

Mr. Paul: That is all.

(Signature waived.)

(Thereupon the taking of the deposition was concluded.)

CERTIFICATE

STATE OF FLORIDA,
County of Dade, ss:

I, J. H. Schneider, a Notary Public for the State of Florida, at Large, do hereby certify that Paul T. Briardy was by me first duly sworn to testify the whole truth, and that the above deposition was recorded stenographically and reduced to typewriting by me.

I further certify that the reading and subscription of said deposition was waived by the deponent and counsel for the respective parties, and that said deposition constitutes a true record of the testimony given by said witness.

[fol. 93] I further certify that the said deposition was taken at the time and place specified in the annexed notice, and that the taking of said deposition commenced on the 1st day of September, 1950, at 2:00 o'clock in the afternoon, and was completed at 3:15 o'clock in the afternoon of that day.

I further certify that Vincent C. Giblin, Esq., and David Drucker, Esq., of Miami, Florida, appeared as attorneys for the plaintiff, and Will M. Preston, Esq., and Daniel Paul Esq., of the firm of Loftin, Anderson, Scott, McCarthy & Preston, of Miami, Florida, appeared as attorneys for the defendant and that each was present during the entire examination.

I further certify that I am not an attorney or counsel of any of the parties, or a relative or employee of any attorney or counsel connected with the action, or financially interested in the action.

Witness my hand and official seal in the City of Miami, State of Florida, on this 5th day of September, 1950.

(S.) J. H. Schneider, Notary Public State of Florida at Large. My Commission expires May 25, 1951.
(N. P. Seal.)

On August 21, 1950, Notice of Taking of Deposition of Marvin C. Whatmore was filed and a receipt for said notice was acknowledged on August 3, 1950.

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[fol. 94] IN UNITED STATES DISTRICT COURT

DEPOSITION OF MARVIN C. WHATMORE—Filed August 21, 1950

The deposition on oral examination of Marvin C. Whatmore, a witness produced by the plaintiff in the above entitled action, was taken, pursuant to notice (a copy of which is hereto attached), at 488 Madison Avenue in New York City, New York, on Wednesday, August 9, 1940, beginning at ten o'clock in the forenoon, before Gretchen Byrnes, a notary public and an officer duly authorized and qualified by and under the laws of the State of New York to administer oaths.

The deposition was stenographically reported (in the presence of such notary) and the stenographic notes thereof were transcribed (under such notary's direction) by Murray Sanders, a stenographic reporter.

There were in attendance during the taking of such deposition Vincent C. Giblin (of Miami, Florida), counsel for plaintiff, and Loftin, Anderson, Scott, McCarthy & Preston (of Miami, Florida), John F. Harding and Arthur E. Farmer (of New York City) of counsel for the defendant appearing specially.

Mr. Farmer: I would like to make a statement for the record, that these appearances are not being made by way of general appearance, but are being made specially and solely in connection with the motion for which this deposi-
[fol. 95] tion is being taken. It is not the intention of the defendant Cowles Magazines, Inc. to appear generally in this action.

Mr. Giblin: That is understood by the plaintiff and so stated in the notice.

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MARVIN C. WHATMORE, after having been duly sworn by such notary, was examined and testified under oath as follows:

Questions by Mr. Giblin (on direct examination):

Q. Will you state your name, place of residence and occupation, please?

A. My name is Marvin C. Whatmore. My residence is Norwalk, Connecticut. My occupation is vice-president and business manager and director of Cowles Magazines, Inc.

Q. Do you know when Cowles Magazines, Inc. was incorporated, Mr. Whatmore?

A. Yes, sir.

Q. When was it?

A. October 16, 1936.

Q. When was the publication of Look magazine started by that company?

A. The first issue of Look magazine to be sold to the public was on January 5, 1937.

Q. Have you been connected with the company since its incorporation?

A. No, sir.

Q. When did your connection with the company begin?

A. I started with Look magazine on January 15, 1937.

[fol. 96] Q. That was shortly after the incorporation of the company?

A. Yes, sir.

Q. Was that prior to the first issue of the magazine?

A. No, sir, that was ten days after the first issue went on sale.

Q. Did you participate in any discussions or conferences which led to the adoption of any policy as to the circulation of the magazine?

A. I have worked with circulation problems of the magazine since the early inception of the magazine.

Q. In what State was Cowles Magazines, Inc., incorporated?

A. The State of Iowa.

Q. Does the company maintain any offices or places of business in that state?

A. It does.

Q. What is the character of the office it maintains there?

A. Des Moines, Iowa, is the City of publication. We have our subscription department operating in Des Moines, Iowa. We have an officer of the corporation located in Des Moines, Iowa. We hold our annual stockholders' meeting in Des Moines, Iowa.

Q. Was there some peculiar reason for the selection of Iowa as the State of incorporation?

A. There was in the beginning. All of the principal officers of the magazine lived in Des Moines, Iowa, and Des Moines was the magazine publishing center.

Q. In what other cities of the United States does the company maintain offices and places of business?

[fol. 97] Mr. Farmer: Would you mind asking first which offices and then which places of business?

Q. Will you state, please, in what other cities or places the company maintains offices?

A. We maintain advertising offices—if I understand the question correctly, you want the cities in which we maintain offices?

Q. Yes.

A. We have advertising offices in Boston, Philadelphia, Cleveland, Detroit, Chicago, Los Angeles and San Francisco. We have an editorial office in Chicago and in Los Angeles, California. We have editorial, advertising and circulation offices in New York City.

Q. As distinguished from offices, do you have places of business in cities other than New York and Des Moines?

A. I don't understand—places of business?

Q. Mr. Farmer suggested the distinction.

A. My answer would be no, unless there is a definition of places of business.

Q. Will you state, please, the purposes for which these advertising offices are maintained in the various cities which you have named?

A. Advertising offices are maintained for the purpose of soliciting advertising lineage in the magazine.

Q. You have a number of employees of the company in those cities in which advertising offices are maintained?

A. A small number of employees. Each office is operated with one or two; very small-sized staffs.

Q. I presume that the Cowles Magazines, Inc. is a corporation which is not endowed in any way?

[fol. 98] Yes, sir.

Q. It depends, then, for its economic survival on profits from operations?

A. Yes.

Q. And its principal corporate purpose is to have the greatest number of people possible read the various magazines published by the company?

A. Yes, sir, that is the goal of all magazines.

Q. Will you explain, please, the importance of circulation to the magazine company or to the publishing company?

Mr. Farmer: Aren't we getting just a little far afield as to whether we are doing business down in Florida and whether American News Company is the agent representing Cowles Magazines, Inc.?

Mr. Giblin: I think not.

Mr. Farmer: I frankly don't see the purpose on the question as to whether we are doing business there and whether American News Company is our agent there.

Mr. Giblin: You object to the question?

Mr. Farmer: I object to the question. It seems to me that it is not relevant to this particular inquiry.

[fol. 99] Q. Will you answer the question?

A. Well, circulation is important as a source of revenue and the quantity of circulation is a basis of your advertising rate structure.

Q. The greater the circulation the greater appeal the magazine has to an advertiser or to the prospective advertiser?

Mr. Farmer: The same objection; not relevant.

A. That is not necessarily true.

Q. Well, it is certainly true that an advertiser who wishes to reach a nation-wide public would not consider a good advertising medium a magazine which has circulation only in one or two States?

Mr. Farmer: I am going to take an objection for the purpose of the record to all questions having to do with the purpose of obtaining circulation and whether or not circulation is related to advertising or other revenue.

A. Yes, the limitation of circulation as to localization would be a detriment to the sale of advertising, but just sheer numbers is not necessarily an inducement for advertisers to buy space.

Q. Of course, what you call "quality of reading public" is also an element to be considered?

Mr. Farmer: The same objection.

A. Certainly, there are magazines with great circulation that are not good advertising mediums.

[fol. 100] Your advertisers are principally firms and concerns that wish to sell everywhere in the nation goods or products or commodities?

Mr. Farmer: I am not only going to object, but I am going to ask the witness not to answer on the ground that this is not relevant on the inquiry.

Q. What is the major source of income—revenue from circulation, or from advertising?

Mr. Farmer: The same objection. I direct the witness not to answer.

Q. What methods, or means have been adopted and pursued by your company to obtain the maximum circulation of Look magazine throughout the nation and elsewhere?

Mr. Farmer: I will object on this unless that is limited to Florida. I direct the witness not to answer except as to Florida.

Mr. Giblin: I think it is important to know if there is any distinction in policy or practice in Florida; if it differs from that adopted and pursued in other States.

Mr. Farmer: I will withdraw my objection if you will ask the question in the form you stated.

(Colloquy off the record.)

[fol. 101] Q. Mr. Whatmore, will you state, please, if you know, what the circulation is of Look magazine in Florida,

that is, the number of copies sold during the past six months?

Mr. Farmer: Make that particular issues, or an average. He can't give you the total.

A. The average issue circulation in the State of Florida would total in the area of 48,000 copies of Look magazine.

Q. Has there been an increase in 1950 over a corresponding period in 1949?

A. That I would have to dig out. Offhand I would answer yes, there has been an increase over 1949.

Q. How is the circulation in Florida handled? Do you have a contract with the American News Company for the distribution of Look magazine for sale at newsstands and other retail outlets?

A. We do not have a contract with American News Company.

Q. There never has been in existence a written contract between Cowles Magazines, Inc. and American News Company?

A. There was, or may have been, a contract prior to publication. I think there was a contract entered into in October, 1936. It was modified orally before publication and in my experience with Cowles Magazines, Inc. I have never operated under that contract.

Q. Well, as modified orally, is that contract still in effect?

A. No, sir.

Q. Under what arrangement, understanding or agreement do you deliver magazines for sale in Florida to American News Company?

[fol. 102] A. Well, we work on a basis—we have a basis of operation that has evolved over the years and the arrangement is simply this: We prepare individual sheets having a listing of the number of copies we think American News Company should sell in Florida. We submit that schedule listing to the American News Company in New York, who take this listing and prepare an order sheet and return the order sheet to us as their order for the magazine, and we fulfill their order sheet with copies of each issue of the magazine. That process takes place with each and every issue published and on the "on sale" day of the

magazine we send them an invoice for the number that appears on the order sheet and on the "off sale" date, we receive the first payment on that delivery and they deduct from that any returns on unsold copies of prior issues and send us a check. It is a simple arrangement of vendor and vendee.

Q. What reasoning process do you employ in determining the number of copies which you think the American News Company should get for sale in Florida of each issue?

A. Well, the present base of operation is that we have a very efficient circulation manager and department and we do a lot of analysis and research of each issue sale and we make our own suggestion as to the efficient print order that the American News Company should receive.

Q. How do you go about making the studies or analysis upon which you estimate as to the number of copies the American News Company will need for sale in Florida?

A. In the accounting of each issue we bill the American News Company for the print order of an issue and they are charging us with returns. We know what the sales are of [fol. 103] each issue and based upon the analysis of what the sales are, we determine what the print order should be on succeeding issues.

Q. The American News Company, since the publication of Look magazine began, has been the wholesale distributor of the magazine in Florida?

A. In the first place, they are not our distributor. They are wholesalers and we have another wholesaler in Florida.

Q. Is the territory divided, or do they both serve the entire State?

A. The area is divided in Florida.

Q. In what area does the American News Company act as wholesaler?

A. They are wholesaler in the entire area except the area in Panama City and the immediate surrounding area of Panama City.

Q. By what wholesaler is the Panama area served?

A. The Cooper News Company.

Q. Is that an incorporated company?

A. I can't answer that. I don't know. I could find out.

Q. Has the Cooper News Company been a wholesaler

in Florida in the area mentioned, since the publication of the magazine began?

A. No, subject to check I think they were started in 1944.

Mr. Harding: 1940, I think.

The Witness: 1940.

[fol. 104] Q. My understanding is, and if I am not correct will you please say so, that initially American News Company was the only wholesaler in Florida; is that correct?

A. Subject to checking, I think you are correct.

Q. Did the American News Company have any contractual agreement or understanding with your company when the publication of Look magazine began, that it would be the sole wholesaler in the State of Florida?

A. Under our base of operation, that has never been so. Pre-publication, I don't know if there was such understanding. But later there was never any such basis of understanding. As we have needed other wholesalers to produce a more efficient sale we have added them as we needed them.

Q. Has there been any addition to the wholesaler companies in Florida other than the addition of Cooper News Company?

A. I honestly can't answer. I would have to check. That is the only one operating now and for the last few years.

Q. Why was it that the Cooper News Company was selected by your company as a wholesaler in a limited area in the State of Florida?

A. Our circulation department felt that we would get a better sale in that particular area through Cooper News Company than American News Company sales.

Q. Can you give me some idea of the personnel of the Cooper News Company? Does it operate elsewhere than in Florida?

A. I can't answer that. I just don't know. I would imagine they do not operate in States other than Florida.

[fol. 105] Q. You don't think they do?

A. That is my thought, that they do not.

Q. Just who are they, do you know?

A. I know no more about Cooper News Company than I do about three hundred other wholesalers we do business with other than American News Company. The operation is similar in all areas. I don't know the people involved. They pay their bills promptly.

Q. Did you have anything to do with the selection of Cooper News Company in Florida?

A. I did not.

Q. Who did make the determination of selection?

A. It would have been made by the heads of our circulaiton department.

Q. Who is the executive head of the circulation department? Can you tell me who was in charge of the circulation and who effected the change as to distribution in Florida by the selection in 1940, or at some other time, of the Cooper News Company as a wholesaler?

A. In the year 1940 our newsstand circulation director was Mr. S. O. Shapiro.

Q. Is he still serving in that capacity?

A. No, sir.

Q. And in what capacity does he now serve?

A. He is now vice president; assistant to the president.

Q. Do you know of any complaint as to the distribution by American News Company in the area which is now being served by Cooper News Company, prior to the latter's selection?

A. Will you please restate that question?

Q. You have testified that the circulation department felt that better results would be obtained by designating Cooper News Company as the wholesaler in a specified [fol. 106] area in Florida, and I want to know if that conclusion was reached as a result of some complaint or some objection, or method or otherwise of American News Company in that area?

A. I will answer that question generally as it applies to all wholesalers other than American News Company. There are many areas in the United States that American News Company does not service, or areas that are serviced by a wholesaler who has been established for many years and American News Company finds that it is uneconomical to include those areas—those retail outlets—as part of their scheme. In those areas where the wholesaler other

than American News is stronger, or areas not served by American News Company, all magazines, I think without exception, follow the practice of Look magazine in engaging the wholesaler who is strongest in any particular area.

Q. Of course, that is a good business policy and I am trying to ascertain why the selection and designation of Cooper News Company was made in 1940, or whenever it was selected. What reason motivated the choice?

A. I would say there was no motive, but it was to obtain a greater sale than through American News Company.

Q. Who, for Cooper News Company, is in charge of the newsstand circulation in the area served by Cooper News Company?

A. I would say it would be the management of Cooper News Company. I don't know the name of the people.

Q. Do you regard 48,000 circulation in Florida as good circulation in that State, in view of the population?

[fol. 107] A. I am never happy with circulation, Judge. It always should be greater. I would say it is just average.

Q. What action are you taking to increase that circulation in Florida?

A. We have no special plan for the State of Florida. We advertise nationally; promote nationally.

Q. What have you been doing in the past in Florida to increase your circulation in that State?

A. Florida receives the same treatment as all other States receive and the benefit of all national promotion we have. We can't favor one State. That would be out of pattern for a national advertising picture.

Q. Well, I know of a newsstand in Coral Gables, Florida, which never has enough copies of Look magazine. What do you do in a situation of that kind?

A. Too often the retailer does not tell us of that condition for us to correct it or recommend its correction, and we have in many cases followed that up ourselves through our road men—district men that we have on our circulation staff.

Q. If he does make a complaint and it reaches you, you see that a correction is made?

A. Yes, if he receives such a complaint we take it up and correct it.

Q. That is, your road man——

A. Yes, sir.

Q. What is the title of the so-called road men?

A. These are circulation road men, district men. We used to call them assistant circulation managers.

Q. How many such men do you have working in Florida?

A. We have a district in the Southeast—it comprises five States. That man in the five-State territory covers the State of Florida.

[fol. 108] Q. What are the other States?

A. Florida, South Carolina, Mississippi, Alabama and George.

Q. And what is his name?

A. His name is Paul Briardy.

Q. Paul T. Briardy?

A. I am not sure of his middle initial.

Q. How many subordinate employees are under him?

A. None.

Q. What is his function? What are his duties?

A. His duties, as a road man, are to travel his territory regularly, checking retail outlets to find out about conditions such as you named, to make sure that we get the proper position on a newsstand and in general get the most efficient sale possible; checking retail outlets. You might say that he is a promotion and complaint man.

Q. He acts in a supervisory capacity to see to it that your wholesalers in Florida do a good job?

A. Not in a supervisory capacity.

Q. His function is to see to it that the wholesale distribution is as good as it can be made?

A. Not distribution. He has nothing to do with that. He is there to see that there is proper display. If a man is not getting enough copies he will write us in New York.

Q. Briardy will?

A. Yes, and he might also call the local branch manager of American News Company.

Q. If a newsdealer is getting magazines late, does Briardy report that to the home office?

A. Yes, if he receives such a complaint.

Q. He doubtless does from time to time?

A. I would doubt very much he would get that. That would be a retailer contacting his wholesaler. The re-
[fol. 109] tailer's job is to make a profit from the sale, and

if he has late deliveries his first channel of complaint would be the American News Company where he buys them.

Q. Of course, you sell your magazines in Florida at a price lower than the usual retail price?

A. Yes, to the wholesalers.

Q. I notice, Mr. Whatmore, in various places where Look magazine is sold, from time to time there are advertising displays on newsstands and other places of sale. Is the placing of such advertising under the supervision of Briardy?

A. Again, that would be a matter of position. If they have a stand, they receive the posters under separate cover from the circulation department and it would be his job to check displays.

Q. Those posters are not furnished to retailers by American News Company?

A. No, that is all at our expense.

Q. Those are sent directly from New York?

A. Some are. Our traffic department may have them included in bundles of the magazine.

Q. Mr. Briardy, I happen to know, has had other men than himself going about in Miami Beach placing the advertising displays. By whom are those employees hired and paid?

A. That I would have to check into.

Q. You have stated that the only employee of Cowles Magazines, Inc. who performs any services whatever in the State of Florida for and in behalf of the company is Briardy?

A. Right.

Q. Are you positively sure that that is correct?

A. I'd certainly want to check it. I know of no one on the payroll and know of no authorization that Briardy has for making such commitments.

[fol. 110] Mr. Farmer: We will have that checked right away to be sure.

Q. What authorization does Briardy have as to the incurring of expenses other than his salary?

A. As circulation road man he has no authorization to commit the company whatever except for his own traveling expenses, and his traveling expenses would include postage

for his reports to the home office, telegraph expenses, telephone, toll expenses.

Q. Briardy serves five States?

A. Yes.

Q. If he is in Atlanta, Georgia, or Montgomery, Alabama, at the time these advertising displays reach Florida for display on newsstands, how can Cowles Magazines, Inc. get those displays placed unless it has somebody to do it?

A. Well, you trust the retailer to that extent, and you don't get 100 per cent cooperation from them.

Q. How does the dealer get them in the first place; from whom—the retailer?

A. Two ways. We may send them direct to New York, or we directly include them in the bundles of magazines so that when a retailer opens his bundle of magazines he may find at the bottom two posters.

Q. Does Cowles Magazines, Inc. keep a record of the names and places of business of each newsstand and other place of business where Look magazine is for sale?

A. No, sir.

Q. It does not?

A. It does not.

Q. How then can you send the advertising displays that we have been talking about directly to the retailer?

[fol. 111] A. They are included in the bundles of magazines.

Q. That go to American News Company?

A. Yes, and ultimately the bundles intact go to the various retailers.

Q. Do you know whether any employees of American News Company go about the City of Miami and Miami Beach placing these posters and other advertising displays on newsstands and other places?

A. I do not know that for a fact.

Q. Has Mr. Briardy been here in New York at the home office since the institution of this litigation?

A. No, sir.

Q. Are you sure of that?

A. Not as far as I know.

Q. Has Mr. Briardy been discharged since the institution of this suit?

A. No, sir.

Q. Is his discharge contemplated?

A. No, sir.

Q. Have his duties been changed since the institution of this litigation?

A. No, sir.

Q. Is there any contemplated change in his duties?

A. No, sir.

Q. Do you have any Florida advertisers who advertise in Look magazine?

A. Yes, we do have.

Q. What method or means does your company employ to procure advertisers from Florida in your magazine?

A. The only advertisers we have from Florida appearing in Look magazine have their agencies in New York City and the advertising contact is by a Look advertising man with [fol. 112] the agency in New York. We have no contact with the advertisers.

Q. I notice in the New York Times within the last few days a large advertisement of Look magazine dealing with some studies made in Cleveland—analyses—and suggesting to prospective advertisers that they get in touch with your representative. Who is the representative whom the advertisers is to communicate with?

A. With one of our advertising offices. Frequently in those advertisements we will give the address of our advertising office.

Q. Of course, you would like to have as many advertisers, as well as many readers, as possible. What efforts do you make to get advertising from the Florida advertisers?

A. In the trade the only method to solicit advertising is with the advertiser's representative, which is his advertising agency. It is unethical to contact the advertiser directly. It can be done after many years of association, but in the solicitation of an account it is through the account executive in the advertising agency handling the account of the advertiser.

Q. Well, what advertising agency does the solicitation work in Florida?

A. I think there would be numerous agencies representing advertisers in the State of Florida; numerous agencies in New York City; in Chicago.

Q. Of course, I want to get something into the record here that the Court will understand. Explain simply how and in what manner Look magazine gets advertisers to place their advertisements in Look magazine. You don't simply wait for somebody to ask for the privilege of that advertising?

[fol. 113] A. Look magazine has a large staff of advertising salesmen whose principal job it is to call on all the agencies daily in their city of operation, selling the agency on the advantages of advertising in Look magazine, and the salesman prepares presentations, sales arguments, for the particular type of account. Each salesman has a list of all the advertisers the advertising agency represents and our sales staff's job is to sell the agency on placing their advertising lineage in Look magazine.

Q. Of course, there are a number of such advertising agencies in Florida. Your representatives and agents have visited those agencies in Florida for the purpose you have outlined?

A. Not for a long, long time. I can't recall such a visit to a Florida agency.

Q. How are those agencies reached, then, to sell them on the value of advertising in Look?

A. They could be reached by our representatives in New York or Philadelphia going there, but more likely because of the small amount placed by small agencies in Florida, all such contacts would be made by correspondence.

Q. That is, correspondence between your office and——

A. The advertising agency.

Q. There are a number of prospective advertisers in Florida that, in your opinion, would do well to advertise in your magazine, are there not, such as the various Chambers of Commerce, the various resort municipalities?

A. Yes, any agency representing a national advertiser is a prospect.

Q. And you do make consistent and continued efforts to procure such advertising in Florida as well as in every other State?

[fol. 114] A. We do.

Q. How long has Mr. Briardy been in the employ of Cowles Magazines, Inc.?

A. Mr. Briardy started in June, 1949.

Q. Prior to that time, who served the company in the capacity in which Mr. Briardy now serves it?

A. There was a shifting of districts. Mr. Briardy was hired to replace a Mr. Simmons. At that time Mr. Simmons was operating in the Denver district. I would have to check the records to find out who had the district that Mr. Briardy has.

Q. Would you mind doing that?

A. I will do it.

Q. Now, we have been speaking of the sale of magazines at newsstands and other retail outlets. In what way do you handle the distribution of your magazine, Look magazine, to the individual subscriber that receives his magazine at his home or at his office?

A. Judge, are you speaking of the whole operation—the procurement of the order and the servicing of the subscriber?

Q. What I am getting at is, how do you go about getting people to subscribe?

A. Look magazine prides itself on having most of its subscribers on a voluntary basis; meaning that the subscriber has written to us directly sending in his order. Fifty per cent of the subscribers in Florida have been procured through direct mail, on a voluntary basis. The others have purchased their subscriptions through agents—agents selling the subscription and sending the order to us with cash.

Q. You have a department called the "Single Copy Department"?

A. It is called "Newsstand Circulation Department"; which is Single Copy Department.

[fol. 115] Q. What is the department that deals with the individual subscriber?

A. "Subscription Department."

Q. What is Briardy's title?

A. "District Man" is the title I give them. Some may be called circulation road men. Some even call themselves district managers, but they are not a manager because they have no one working for them.

Q. Collier's for example, has a man who is called District Supervisor of Single Copy Department; is that substantially Briardy's job?

A. I don't know exactly what Collier's setup is. They have many fancy titles, so that the goodwill of a man's title is accepted. Collier's many have a local man in Florida, which we do not have.

Q. Your business is handled by district rather than by locality?

A. Yes.

Q. Would you mind getting now the name of Briardy's predecessor?

(Brief recess.)

Q. Have you ascertained the name of Mr. Briardy's predecessor?

A. David Eckhardt.

Q. Is he still in the employ of the company?

A. No, sir.

Q. You don't know, then, where he is at present?

A. I do not.

Q. Do you know where Mr. Briardy is at present? The reason I ask is that I would like to take his deposition prior to September 7th.

A. That we can find out. Where he is we will be able to learn in a day or so.

[fol. 116] Q. I would like to take his deposition at the convenience of counsel rather than arbitrarily fix a time and place. Mr. Whatmore, would I, or anyone else, be privileged to buy Look magazine at a price lower than retail price, from your company, and resell the magazine in Florida at the retail price?

A. As a retailer?

Q. As a wholesaler.

A. Yes, if you had a territory and could show us that your sale as a wholesaler would be the most efficient operation that we could have for the magazine, then we would want you as a wholesaler.

Q. Then the American News Company is not the exclusive agent in Florida in all the area save that of the Cooper News Company? It does not have an exclusive arrangement?

A. No, sir.

Q. Cowles Magazines, Inc. selects its own wholesaler; it

is not bound by contract to furnish one particular wholesaler?

A. That's right, we have some three hundred wholesalers.

Mr. Farmer: You don't mean just in Florida?

The Witness: No, nationally.

Q. If I or someone else could convince you that we could increase the circulation of Look magazine in Dade County over that which now exists, you would be prone to give me, or such other person, the wholesale distribution in that area rather than American News Company?

A. Yes.

[fol. 117] Q. Do you know whether there was any peculiar or impelling reason for the selection of the American News Company as the wholesaler in Florida?

A. In the beginning the publisher would naturally pick the largest wholesaler in the business, and that would be the compelling reason for a new publisher to select the American News Company as a wholesaler.

Q. I hate to indulge in repetition, but in estimating the number of copies which the American News Company should have for wholesaling in Florida of the next issue of Look magazine, do you base your estimate largely on preceding sales—sales of other issues?

A. Many factors are taken into consideration. Preceding issue sale, seasonal trends based on the last year or two years prior are factors.

Q. I suppose the peculiar content of some issue, if it was dealing with a Florida situation; if it had a local interest; would induce the conclusion that a greater number of copies might be needed.

A. It might if prior sales were very good; it might.

Q. Is it your function to make that estimate, or is there some other man in the organization who does that?

A. That is done by our order department, which makes out the recommendations.

Q. Is that located in New York City, too?

A. Yes, sir.

Q. Who is in charge of that department?

A. I think there are several people who get their heads together on that. The gentleman who would head up that

division would be Mr. Tom Butler, with the advice and counsel of several others.

[fol. 118] Q. Do you place advertising yourself in the newspapers?

A. You mean personally?

Q. No, the company.

A. The company does.

Q. Have you ever placed advertising in Florida newspapers?

A. Subject to check, I am sure that we have.

Q. Now, what is the purpose of such advertising in Florida papers?

A. It would be to promote the sale of the magazine to the public.

Q. In other words, to increase circulation?

A. Yes.

Q. Can you name some of the newspapers in Florida in which your company has advertised?

A. I can't offhand, I can get it for you.

Q. To name certain prominent and influential newspapers wouldn't aid you, would it?

A. It would not.

Q. Is your company privileged, so far as any contract or arrangement with American News Company is concerned, to immediately change your wholesale distributor in Florida?

A. If we feel we can improve we do so.

Q. You are not bound to give them thirty, or sixty, or ninety days' notice?

A. No sir.

Q. I think you have stated that there is not any contract or arrangement in existence between Cowles Magazines, Inc. and American News Company?

A. Except the one arrangement I mentioned, which we have never operated under.

Q. I am not certain, insofar as your answers have communicated themselves to me, as to whether that contract is in effect at the present time or not?

[fol. 119] A. It is not in effect in 1950. The arrangement under which we are now working with American News Company is on the basis of operation that has evolved over the years.

Q. Well, then, am I correct in assuming that the written contract of which you have spoken is canceled?

A. Off the record, I have no knowledge at all.

Mr. Harding: I believe it is superseded. Whether it was formally canceled, it was superseded.

Mr. Farmer: At any rate, it is not in effect.

Q. Do you have available a copy of that contract?

A. I do not have it.

Mr. Farmer: That contract was superseded many, many years ago. In fact, as I understand it, in 1937 it was superseded. I would object to it on the ground that it is not relevant.

Mr. Giblin: In other words, you are advising the witness not to produce it for inspection, and if I seek it, you will not produce it.

Mr. Farmer: That's right, on the basis which I have just stated.

Q. Now, do you handle your circulation in Florida differently from the methods you employ in other States?

[fol. 120] A. No, sir.

Q. Can you tell me what the circulation in Florida was of the May 23, 1950 issue of Look magazine?

A. The best estimate of total circulation in the State of Florida of the May 23, 1950 issue is 48,593.

Q. Can you tell me what number of copies were circulated in Dade County, Florida?

A. No, sir.

Q. Is there any way by which you can break that down into areas and localities?

A. We can estimate that for you and get it.

Q. Would it take long?

A. No, sir, I could have someone do it now. We could have it by this afternoon. We would have to project that figure from information we have.

Q. The figures which you would give us would be an approximation which would approach accuracy at least?

A. Yes, sir.

Q. Will you do that? I would like to know how many—I don't know whether it is pertinent. You need not put it in the testimony. Just let me know.

Mr. Farmer: I will write you a line.

Q. Mr. Whatmore, what is Mr. Paul T. Briardy's mailing address?

A. His mailing address changes from day to day. For instance, his payroll check is mailed to the last address furnished us in his itinerary.

Q. In other words, he goes from place to place in his district and accordingly his mail address changes with his movements?

A. Yes.

[fol 121] Q. Is he compensated by salary alone, or is there commission?

A. No commission whatever; salary and reimbursement of travel expenses.

Q. Do you know his place of legal residence?

A. The only address we have for him in Florida is 145 Southwest 21st Road, Miami.

Mr. Farmer: We don't know whether that is his legal residence or not.

Q. You do know that certain members of his family reside in Dade County, Florida?

A. I understand that his family has lived there for years.

Q. Does he have any connection at the present time with the Miami Daily News?

A. Not to my knowledge.

Q. You know that at one time he was in the employ of the company which publishes that newspaper?

A. I don't know.

Q. Now, the circulation of a magazine which attempts to reach a nationwide public is quite different from that of a newspaper, is it not? Have you ever been engaged in the newspaper business?

A. Yes, I put in one year on a newspaper.

Q. The average newspapef is confined to a limited area, whereas a national magazine, such as Look, is distributed throughout all the States of the Union?

A. Generally that is true. A newspaper is local and a magazine is national in interest.

Q. Where do you, and how do you, procure the reading matter which is published in Look magazine?

[fol. 122] A. The question is, how we procure reading matter to publish in the magazine?

Mr. Farmer: I am going to object to the form of the question.

Q. For instance, are there any events or matters occurring in Florida in which you would likely be interested for the purpose of publishing articles concerning it?

A. Events happening in Florida that would have interest nationally would be suitable for any national magazine.

Q. Does the company interest itself in procuring articles of that kind, emanating from Florida as well as any other State?

A. I think the correct answer is that as a national magazine we are interested in publishing material that is of interest nationally.

Q. No matter what its origin?

A. Right.

Q. Do you have any news gatherers employed anywhere in the United States?

A. News gatherers?

Q. Yes.

A. You will have to define what you mean by "news gatherers".

Q. Well, state generally the sources of articles which appear in Look Magazine.

Mr. Farmer: Well, I will object to that as beyond the scope of the examination and direct the witness not to answer.

[fol. 123] Mr. Giblin: There is nothing objectionable if you understand what I am driving at. If I write an article which I think would be of nationwide interest and which would likely interest your company, I probably would send it. The usual method would be to send it into the company. Do you have in your employ writers who write for the magazine, as distinguished from volunteers such as I would be if I wrote an article?

Mr. Farmer: I will object to it unless it is limited to Florida and direct the witness not to answer unless so limited.

Mr. Giblin: Well, that I think is a little silly, to object on

the ground that it is not Florida. This magazine does not care where the article emanates from. It wants to publish in the magazine that which interests the public.

Mr. Farmer: We are interested here, according to the motion, only with the service.

Mr. Giblin: What I want to know is whether Look magazine has writers, news gatherers, in its employ who would go into Florida to write an article if it had some interest to the public.

Mr. Farmer: You may ask that.

[fol. 124] Mr. Giblin: Of course, there are interests all over, but I am interested in whether there are any people in the employ of the company who go into Florida for the purpose of gathering information to write articles for Look magazine.

A. They may. Writers in the employ of Look magazine go into Florida.

Q. They may, but have they?

A. Over the years, yes.

Q. In other words, if Look magazine thinks there is in Florida material or information which will be the basis of an article, it will send writers into Florida to enable them to write the article?

A. Yes.

Q. That activity, of course, is nationwide; it is not peculiarly limited to Florida or any other State?

A. Right.

Q. Do you have any regularly retained attorneys in Florida?

Mr. Harding: We do not.

A. No, sir.

Q. Do you have any person, firm or corporation in Florida who, or which, is an employee or is an independent contractor who performs any services or is available for the performance of services to Cowles Magazines, Inc., other than the wholesale distributors, Cooper News Company, American News Company and Mr. Briardy?

A. There are agents that may operate in Florida and sell subscriptions.

[fol. 125] Q. To the magazine?

A. To Look magazine.

Q. Has that been the practice in the past—a consistent practice?

A. Yes, a consistant practice. There are no exclusive agents; they have hundreds of magazines.

Q. And they are paid a commission by the magazine?

A. Yes, they collect the full advertised contract price of the subscription from the subscriber and deduct their commission from the amount and the balance is remitted to us.

Q. Are there any other persons, firms, or corporations which are in the category which I have designated?

A. None whatever.

Q. Has Cowles Magazines, Inc. ever been sued in the State of Florida before this litigation?

A. No; no, sir.

Q. This is the only suit or action in Florida in which Cowles Magazines, Inc., so far as you know, has ever been a defendant?

A. Yes, sir.

Q. Has Cowles Magazines, Inc. ever instituted any litigation in Florida?

Mr. Giblin: I believe that is all.

Questions by Mr. Farmer (on cross-examination):

Q. You talked about the agents who sell subscriptions to Look in Florida. By whom are they employed?

A. Subscription agents are in many cases large companies in themselves, operating out of New York, Phila- [fol. 126] delphia, the East, and have crews that may tour the country, and some of those crews at times get into Florida. They are employees of subscription agency houses.

Q. Are all the subscription agents to whom you have referred employees of subscription agency houses?

A. No, in a few isolated cases I would estimate around twenty that may be identified as independent contractors operating in their home town part time. They call themselves part-time agents selling magazines of all kinds. I would say they would not sell more than forty or fifty subscriptions in any year to Look in any one State.

Q. With respect to those agents, does the defendant reserve the right to reject subscriptions?

A. Yes, sir.

Q. Since the beginning of this examination, have you had the defendant's records checked with respect to employees of the company operating in Florida?

A. Would you restate that?

Q. Since the beginning of this examination, did you have anyone check the records of the company to determine which of the company's employees are working in Florida?

A. I familiarized myself with Briardy.

Q. There was a question whether Briardy was the only employee; is that right?

A. Yes.

Q. After that question was asked, did you check the records to make sure?

A. I did.

Q. As a result of that examination, can you state now whether Paul Briardy is the only employee of the defendant who works in Florida?

[fol. 127] A. I can.

Q. Is he?

A. He is the only one.

Q. You were also asked whether employees of the defendant solicited advertising in Florida, and I believe you testified that there may have been such a solicitation out of your Philadelphia and New York offices; is that correct?

A. That's correct.

Q. Do you know of any such solicitation during the past five years?

A. None to my knowledge.

Mr. Giblin: You don't mean that there have not been any, but you don't know of any?

The Witness: That's right, I know of none and your question is whether representatives went to Florida to solicit?

Mr. Farmer: Right.

A. There may have been direct mail solicitation.

Q. I am talking about employees of the defendant going into Florida.

A. Not to my knowledge.

Q. Does the defendant have any salesmen soliciting advertising in Florida?

A. No, sir.

Q. You testified that Look magazine made efforts to procure advertising in Florida. Did you mean by that that the efforts were made in Florida, or that the advertising to be procured was to be procured from Florida?

[fol. 128] A. The advertising to be procured was from Florida, but was sold by us in New York, or Philadelphia, or Chicago, or anywhere the advertising agency may be located, which is not Florida.

Q. Now, with respect to the arrangement with American News Company, you stated that you received from American News Company an order blank for each issue; is that correct?

A. That's correct.

Q. Do you have the order blank for the May 23, 1950 issue?

A. I do.

Q. Will you produce it, please.

Mr. Farmer: I will offer that for identification.

Mr. Giblin: I have no objection to its being considered as an evidentiary exhibit and I will offer it if you wish.

Mr. Farmer: Either way.

Mr. Giblin: I will offer the document in evidence and ask that it be appended to the deposition.

Mr. Farmer: I assume we may have it marked and substitute a photostatic copy in its place as the exhibit?

Mr. Giblin: Yes.

[fol. 129] (Order blank for May 23, 1950 Look magazine received in evidence and marked Plaintiff's Exhibit 1, photostatic copy thereof to be substituted in its place.)

Q. Now, after that order is received by the defendant, what steps are taken by the defendant with respect to shipment of magazines as indicated in the order?

A. When we receive the order sheet from the American News Company we proceed to send in instructions through our traffic department to the bindery.

Q. Where is the bindery?

A. The bindery is located in Chicago.

Q. Is that bindery part of the defendant's organization?

A. No, sir.

Q. What is it; who is it?

A. The bindery is American Color Type Corporation, Chicago, Illinois, who handle the entire binding of Look under contract.

Q. Is it connected in any way by stock ownership or interlocking directorates or interlocking officers with your company?

A. No, sir.

Q. Then what happens?

A. The bindery, upon receipt of the order slips made from the order sheet, proceeds to fill each individual order as listed on the sheet. When the bundles for the respective orders are ready for shipment, they are loaded into trucks, freight cars, railway express, for shipment to their destinations.

Q. You say they are loaded into trucks. Are those trucks owned, operated, licensed or otherwise controlled by the [fol. 130] defendant?

A. No.

Q. What is the nature of the companies operating those trucks?

A. In all cases they are common carriers.

Q. And you say that these bundles are loaded into the trucks, railroad cars, and so forth?

A. Yes.

Q. And how are these bundles addressed?

A. They are addressed to all of the Look magazine wholesalers.

Q. Well, the American News Company?

A. The American News Company, yes, and they would be addressed to the individual branch address. In cases of wholesalers other than American News Company they are addressed to the wholesalers' addresses.

Q. From the time that those magazines reach the bindery, or, say are shipped from the bindery, does the defendant corporation have any control of them whatsoever?

A. Will you please restate that.

Q. From the time that these bundles of magazines are shipped from the bindery, does the defendant have any control of those magazines?

A. From the time they are shipped from the bindery until

they reach their destinations, we have the responsibility of transit, as sender.

Q. Do you mean that if they don't arrive, you have to replace them or be responsible for them?

A. Yes.

Q. You don't have any physical control over them?

A. No physical control.

Q. They are in the hands of the carrier until they reach their destinations? Is that right?

[fol. 131] A. That's right.

Q. Now, does the defendant have any bank account in Florida?

A. No, sir.

Q. Does it have any securities or property, real estate, personal, tangible, or intangible property in Florida?

A. No, sir.

Q. Does it have any telephone listing in Florida?

A. No, sir.

Q. Is anyone in Florida authorized to use the title of the company or have Look magazine printed upon his office door or upon the listing board in any building in Florida?

A. No, sir.

Q. Does it have any safe deposit box in Florida?

A. No, sir.

Q. Does it have any books or records in Florida?

A. No.

Q. Do any of its officers work in Florida for the company?

A. No, sir.

Q. Or any director?

A. No, sir.

Q. Or any employee other than Briardy?

A. No, sir.

Q. Is there any relationship, direct or indirect, stock, financial, interlocking directorates, interlocking officers, between the defendant and American News Company?

A. No, sir.

Q. Has there ever been?

A. No, sir.

Q. Has Cowles Magazines, Inc. ever qualified to do business in the State of Florida?

[fol. 132] A. No, sir.

Q. Well, now, when you bill American News Company for the magazines, is the billing broken down into branches, or is that a lump sum billing for particular issues of Look magazine?

A. It is a lump sum billing for the complete issue of the magazine.

Q. Was that true with respect to the May 23, 1950 issue?

A. It was.

Q. Do you have any transactions whatever—you, meaning the defendant—with any Florida branch of the American News Company?

A. None whatever.

Q. Do you have any transactions with any American News Company branch other than the home office?

A. None whatever.

Q. Other than you have testified, has the defendant anything whatever to do with the distribution or sale of copies of Look magazine? Let me put it another way: Do you have any arrangement, formal or informal, with any of your wholesalers by which you may have the power to direct their operation with respect to the sale of your magazine, Look magazine?

A. None other than what I have testified to.

Q. Where are your subscription copies serviced?

A. From Des Moines, Iowa.

Q. And by your own company?

A. By our own company.

Q. You have no subscription bureau or other bureau for those subscription copies?

A. All subscriptions are serviced from Des Moines.

[fol. 133] Q. Where are copies mailed from?

A. From Chicago, Illinois; from the bindery.

Q. Is any part of the operation or production or distribution of the Look magazine, except as you have already testified, conducted in the State of Florida?

A. None whatever.

Mr. Farmer: Anything else, Judge? I am through.

Re-direct examination.

By Mr. Giblin:

Q. If a student of the University of Miami wants to supplement his income by soliciting subscriptions to Look magazine and other magazines, you would welcome such activity and pay him for his services, wouldn't you?

A. Yes, if he is going to establish himself; if he is selling other magazines.

Q. Well, the solicitation of the subscriptions is not limited to concerns that are engaged in that business, but anybody who wants to help himself and help Look magazine, his services would be readily accepted provided he is found to be reliable?

A. That's right.

Q. Now, if Mr. Briardy reports that a certain newsstand is not getting enough copies weekly, you say that that condition is corrected?

A. As you will note, our order sheet from American News Company only covers divisions. We do not have records of the retail outlets.

Q. After this order sheet was made for the May 23, 1940 issue of Look magazine to the extent of American News [fol. 134] Company, what changes were made in it?

A. American News Company changes they have made in blue pencil, the only other change is 350 copies, as to which I do not have any information.

Q. The changes they have noted are in blue pencil?

A. In blue pencil.

Mr. Giblin: That is all.

By Mr. Farmer:

Q. What percent approximately of the subscriptions obtained from Florida are obtained through people who actually operate in Florida? Now, I am not referring to the New York concerns which just have crews going down, but who actually operates in Florida.

A. Part-time salesmen would produce no more than 250 subscriptions annually.

Q. Out of how many?

A. Out of 10,000 subscriptions sold annually in the State of Florida.

Q. How are these people compensated?

A. The part-time agents work on a predetermined commission basis and when they collect the advertised basic subscription price from the subscriber they are entitled to withhold their stipulated commission and remit the balance with the order to our subscription office in Des Moines.

Q. When does that subscription become effective?

A. If accepted with the first issue we can service or with the issue stipulated by the subscriber.

[fol. 135] Q. With respect to the situation where Mr. Briardy reports to you that some news dealer was selling all his copies and had insufficient copies, what steps would you take to correct the condition?

A. The formal procedure to correct a situation of that kind is for the New York office of our circulation department to contact the American News Company in New York for them to correct the situation. If it repeats we may have our district man check with the retailer to ask if he has asked for more copies, and it may be necessary, as I mentioned before in the testimony, for the district man to take it up with the branch manager of the News Company.

Q. Do you have any right to compel the American News Company to do anything about the matter?

A. No, sir.

By Mr. Giblin:

Q. You have a right to change the wholesaler?

A. Yes.

Q. Where is the principal office of the American News Company?

A. New York City.

Q. Where in New York City; how close to your office are they?

A. 131 Varick Street; several miles from here.

Q. How is the weekly transmittal sheet transmitted?

A. By mail from their office to our office.

Q. And from your office to their office?

A. Yes, by mail.

Mr. Giblin: That is all.

[fol. 136] Mr. Farmer: That is all.

Marvin C. Whatmore.

Certificate of Notary

The undersigned, the officer before whom such deposition was taken, hereby certifies that the witness, Marvin C. Whatmore, a transcript of whose testimony appears above, was duly sworn by and before the undersigned; that such transcript is a true record of the testimony given under oath by such witness; and that such witness, in the presence of the undersigned, examined, read and signed such deposition.

Sworn to before me this 16 day of August 1950. Gretchen S. Byrnes, Notary Public, State of New York Westchester Co. Clke No. illegibile Cert. filed with N. Y. Clk & Reg. Commission expires March 30, 1951 (NP Seal.)

(Here follow 2 Photolithographs, side folios 137, 138)

# EXHIBIT TO DEPOSITION OF MARVIN C. WHATMORE

LOCK — MAY 23, 1950

| DIST. | CHANGED AT CHICAGO TO TRANSFERS | PKG. DEL. | TOTAL ORDER |
|---|---|---|---|
| **NEW ENGLAND** | | | |
| 1 | Boston | B | 2600 |
| 1A | Bangor | C | 800 |
| 1B | Lewiston (Me.) | A | 1550 |
| 1C | Portsmouth (N.H.) | A | 950 |
| 2 | New England | A | 22200 |
| 3 | Brockton | B | 2300 |
| 4 | Lawrence | C | 1475 |
| 5 | Lowell | A | 1175 |
| 6 | Lynn | B | 2400 |
| 7 | Manchester | C | 2700 |
| 8 | Worcester | A | 4000 |
| 8A | Fitchburg | C | 500 |
| 9 | Springfield (Mass.) | B | 6000 |
| 9A | Greenfield (Mass.) | A | 610 |
| 9B | Pittsfield (Mass.) | B | 1875 |
| 9C | Rutland | B | 600 |
| 10 | Rhode Island | A | 9200 |
| 11 | Fall River | B | 875 |
| 12 | New Bedford | C | 2200 |
| 13 | New London | A | ~~3890~~ 3290 |
| 14 | Hartford | A | 7400 |
| 15 | Connecticut | B | 9000 |
| 16 | Bridgeport | A | 7300 |
| **MID-ATLANTIC** | | | |
| 17 | Amsterdam | A | 126000 |
| 18 | Asbury Park | B | 4150 |
| 19 | Atlantic City | A | 2850 |
| 20 | Bronx | A | 23700 |
| 21 | Elizabeth | A | 9200 |
| 22 | Jamaica | C | 15700 |
| 23 | Middletown | A | ~~3825~~ 3875 |
| 24 | Newark | A | 16150 |
| 25 | Paterson | B | 10350 |
| 26 | Poughkeepsie | B | 2675 |
| 26A | Riverhead (N.Y.) | C | 1350 |
| 27 | Trenton | B | 5300 |
| 28 | White Plains | C | 7700 |
| **PALISADE** | | | 8900 |
| 29 | Albany | A | 3600 |
| 30 | Amsterdam | C | 700 |
| 31 | Glens Falls | B | 385 |
| 32 | Schenectady | A | 1950 |
| 33 | Troy | C | 210 |
| 34 | Utica | B | 3000 |
| **ABC FOREIGN** | | | 4825 |
| 35 | Syracuse | A | 5100 |
| 36 | Rochester | A | 6500 |
| 36A | Geneva | B | 1950 |
| 37 | Buffalo | A | 8600 |
| 38 | Erie | B | 2100 |
| 39 | Jamestown | C | 1925 |
| 40 | Niagara Falls | C | ~~1860~~ 2150 |
| 41 | Pittsburg | B | 8600 |
| 42 | Altoona | A | 2300 |
| 42A | Beaver Valley (Pa.) | C | 1200 |
| 42B | Fairmont (W.Va.) | B | 550 |
| 42C | McKeesport | B | 1850 |
| 42D | New Kensington (Pa.) | C | 1675 |
| 43 | Reading | C | 1450 |
| 43A | Uniontown | A | 1575 |
| 44 | Wheeling | C | 1525 |
| 45 | Central | A | ~~38750~~ 41950 |
| 46 | Allentown | B | 4850 |
| 47 | Binghamton | C | 2000 |
| 48 | Canton | A | 2850 |
| 48A | Clarion (Penna.) | B | ----- |
| 48B | Elmira | B | 1525 |
| 49 | Freehold | C | 3400 |
| 50 | Germantown | A | 3150 |
| 51 | Hagerstown (Md.) | B | 1300 |
| 52 | Harrisburg | C | 4600 |
| 53 | Hazleton | A | 1250 |
| 53A | Lancaster | A | 1950 |
| 53B | Norristown (Pa.) | C | 1625 |
| 54 | Reading | B | 2750 |
| 55 | Salisbury (Md.) | C | 1500 |
| 56 | Scranton | A | 2600 |
| 57 | Upper Darby | A | 3300 |
| 58 | Wilkes-Barre | C | 2700 |
| 59 | Williamsport | B | 1450 |
| 60 | Wilmington (Del.) | B | 3150 |
| 61 | York | C | 1950 |
| **SO. ATLANTIC** | | | |
| 62 | Baltimore | A | 11000 |
| 63 | Washington | B | 16500 |
| 63A | Alexandria (Va.) | A | 2800 |
| 64 | Asheville | A | 1400 |
| 65 | Charlotte | B | 3300 |
| 65A | Charlottesville | C | 1475 |
| 65B | Fayetteville | B | 1100 |
| 66 | Greensboro | C | 1675 |
| 66A | Hinton (N.C.) | A | 1400 |
| 67 | Raleigh | A | 1000 |
| 68 | Richmond | B | 3700 |
| 69 | Roanoke | C | 3000 |
| 69A | Winston-Salem | C | 1650 |
| 70 | Virginia | B | 5100 |
| 70A | Newport News | A | 1500 |
| 71 | Georgia | B | ~~9890~~ 6750 |
| 72 | Birmingham | A | 3350 |
| 72A | Charleston (S.C.) | A | 1975 |
| 73 | Columbia (S.C.) | A | 2250 |
| 73A | Columbus (Ga.) | C | 1125 |
| 73B | Gadsden (Ala.) | A | 950 |
| 73C | Macon | C | 515 |
| 74 | Montgomery | C | 1775 |
| 74A | Rome (Ga.) | B | ----- |
| 75 | Savannah | B | 1475 |
| 76 | Southern | C | 3300 |
| 76A | Jacksonville (Fla.) | C | 950 |
| 76B | Daytona South | A | 875 |
| 76C | Lakeland | B | 800 |
| 77 | Miami | B | 8000 |
| 78 | Orlando | A | 1600 |
| 79 | St. Petersburg | A | 1700 |
| 80 | Tampa | C | 1775 |
| 81 | West Palm Beach | B | 1800 |
| **E. NO. CENTRAL** | | | |
| 82 | Wisconsin | A | 7100 |
| 83 | Green Bay | B | 1350 |
| 83A | Madison | B | 2750 |
| 84 | Oshkosh | C | 1225 |
| 85 | Racine | B | 2200 |
| 86 | Sheboygan | C | 1100 |
| 86A | Wausau | A | 1200 |
| 87 | Western | B | 36000 |
| 88 | Aurora | C | 1475 |
| 89 | Bloomington | A | 1600 |
| 90 | Burlington (Ia.) | B | 1300 |
| 91 | Champaign | C | 2350 |
| 92 | Danville (Ill.) | A | 1200 |
| 93 | Decatur | B | 1600 |
| 94 | Elgin | C | 1750 |
| 95 | Evanston | A | 4200 |
| 96 | Gary (Ind.) | B | 2300 |
| 97 | Hammond (Ind.) | C | 1625 |
| 98 | Joliet | A | 2000 |
| 99 | Northern (Chicago) | B | ~~7250~~ 7250 |
| 100 | Peoria | C | 3200 |
| 101 | Rockford | B | 3450 |
| 102 | Springfield (Ill.) | A | 1725 |
| 103 | South Bend (Ind.) | B | ~~4690~~ 4790 |
| 104 | Southern | A | 6300 |
| 105 | Tri-City (Ia.) | C | 3000 |
| 106 | Grand Rapids | A | 3750 |
| 106A | Battle Creek (Mich.) | A | 2425 |
| 107 | Kalamazoo | B | 1875 |
| 108 | Muskegon | C | 1400 |
| 109 | Detroit | B | ~~8800~~ 9050 |
| 111 | East Side (Detroit) | B | 3800 |
| 112 | Flint | B | 3300 |
| 113 | Highland Park | C | ~~4800~~ 4900 |
| 114 | Lansing | B | 2800 |
| 114A | Lincoln Park-Ecorse | B | 3400 |
| 115 | Pontiac | B | 1350 |
| 116 | Port Huron | C | 775 |
| 117 | Saginaw | B | 2550 |
| 117A | West Side (Detroit) | B | ~~5400~~ 5250 |
| 117B | Ypsilanti-A. Arbor | B | 2900 |
| 118 | Toledo | B | 4900 |
| 119 | Lima | C | 1700 |
| 120 | Cleveland | A | ~~15250~~ 15400 |
| 121 | Akron | A | 4550 |
| 122A | Ashtabula | B | 1200 |
| 123 | Canton | C | 1900 |
| 123A | Lorain | C | 1475 |
| 124 | Mansfield (O.) | C | 2300 |
| 125 | New Castle (Pa.) | A | 1325 |
| 126 | Sandusky | B | 925 |
| 127 | Warren | A | 1725 |
| 128 | Youngstown | B | 1800 |
| 129 | Buckeye | B | 7500 |
| 130 | Clark County (O.) | C | 1775 |
| 132 | Marion | A | 875 |
| 133 | Zanesville | B | 1700 |
| 134 | Cincinnati | B | 9850 |
| 135 | Charleston (W.Va.) | A | 2750 |
| 136 | Dayton | B | 5700 |
| 136A | Hamilton | C | 950 |
| 137 | Huntington (W.Va.) | C | 2100 |
| 138 | Parkersburg (W.Va.) | A | 1300 |
| 140 | Indiana | A | 8800 |
| 141 | Anderson | A | 1575 |
| 142 | Evansville | A | ~~9000~~ 9350 |
| 143 | Fort Wayne | B | 2350 |
| 144 | Kokomo | A | 2050 |
| 145 | Lafayette | B | 1600 |
| 146 | Muncie | C | 1900 |
| 147 | Terre Haute | A | 2100 |

400 Surplus #575

100 Surplus #600

50 " "

250 " "

100 " "

150 " "

50 Surplus #600

300 Surplus #602

No Surplus #600

50 Surplus #600

1028

| | | | |
|---|---|---|---|
| | **E. SO. CENTRAL** | | |
| 168 | Louisville | A | 4750 |
| 169 | Chattanooga | B | 1650 |
| 169A | Kingsport | C | 1525 |
| 170 | Knoxville | B | 2300 |
| 170A | Lexington | C | 2275 |
| 172 | Nashville | A | 3800 |
| 173 | Memphis | A | 3650 |
| 173A | Greenwood (Miss.) | C | 515 |
| 173B | Jackson (Tenn.) | A | 625 |
| 174 | Little Rock (Ark.) | B | 2050 |
| | **W. NO. CENTRAL** | | |
| 155 | Minneapolis | A | 4000 5000 |
| 156 | Duluth | B | 2150 |
| 157 | Fargo | C | 2500 |
| 158 | La Crosse | C | 1750 |
| 159 | Minneapolis | B | 8800 |
| 160 | Iowa | B | 3550 |
| 161 | Cedar Rapids | C | 1450 |
| 162 | Ottumwa | A | 725 |
| 163 | Waterloo | B | 1550 |
| 164 | Omaha | A | 4600 |
| 164A | Kearney | A | 800 |
| 165 | Lincoln | B | 1425 |
| 166 | Sioux City | C | 2450 1500 |
| 167 | Sioux Falls | B | 2500 |
| 168 | South West | A | 8000 |
| 168A | Joplin | C | 675 |
| 168B | Lawton (Okla.) | A | 725 |
| 169 | Oklahoma City | B | 3650 |
| 170 | Springfield (Mo.) | B | 1100 |
| 170A | St. Joseph (Mo.) | C | 1500 |
| 171 | Topeka (Kans.) | C | 1900 |
| 172 | Tulsa | A | 2575 |
| 173 | Wichita (Kans.) | B | 2750 |
| 174 | St. Louis | B | 11250 11750 |
| 174A | Mt. Vernon (Ill.) | B | 1625 |
| | **W. SO. CENTRAL** | | |
| 175 | New Orleans | A | 4900 |
| 176 | Baton Rouge | B | 1550 |
| 176A | Gulfport (Miss.) | C | 1150 |
| 177 | Jackson (Miss.) | B | 1525 |
| 178 | Mobile | C | 1725 |
| 178A | Monroe (La.) | C | 1125 |
| 178B | Pensacola | A | 1500 |
| 179 | Shreveport | B | 2300 |
| 179A | Texarkana (Ark.) | C | 1150 |
| 180 | Texas | B | 6600 |
| 181 | Abilene | A | 1950 |
| 182 | Amarillo | B | 2300 |
| 183 | Fort Worth | C | 2900 |
| 184 | Lubbock | A | 1625 |
| 185 | Odessa (Tex.) | A | 440 |
| 186 | Tyler | C | 1950 |
| 186A | Waco | A | 2000 |
| 186B | Wichita Falls | C | 1475 |
| 187 | Houston | B | 7900 7600 |
| 188 | Austin | C | 2050 |
| 188A | Beaumont | A | 2625 |
| 188B | Corpus Christi | B | 2275 2517 |
| 188C | Galveston (Tex.) | B | 1400 1450 |
| 188D | Harlingen (Tex.) | C | 1175 |
| 188E | San Antonio | A | 3750 |
| | **MOUNTAIN** | | |
| 189 | Colorado | A | 6400 6700 |
| 190 | Cheyenne (Wyo.) | C | 900 |
| 191 | Colorado Springs | B | 900 |
| 192 | Utah | B | 3150 |
| 193 | Boise | C | 1000 |
| 194 | Butte | B | 2750 |
| 194A | Ogden (Utah) | A | 1100 |
| 195 | Pocatello (Idaho) | A | 975 125 |
| | **PACIFIC** | | |
| 196 | Puget Sound | A | 6600 6850 |
| 196A | Anchorage (Alaska) | A | 1100 |
| 196B | Fairbanks (Alas.) | A | 550 |
| 197 | Aberdeen | B | 6500 625 |
| 197A | Bremerton | A | 925 750 |
| 198 | Everett | C | 800 |
| 198A | Paso | A | 6600 685 |
| 199 | Spokane | B | 3200 3350 |
| 200 | Tacoma | B | 3400 3450 |
| 201 | Yakima | C | 1025 |
| 202 | Oregon | B | 6800 6900 |
| 202A | Eugene | B | 1250 |
| 202B | Klamath Falls (Ore.) | C | 425 |
| 203 | Medford | A | 925 |
| 204 | Salem | C | 1625 |
| 205 | San Francisco | A | 22000 23100 |
| 206 | Berkeley | A | 3900 3850 |
| 207 | Fresno | C | 2175 |
| 207A | Modesto (Cal.) | B | 1575 |
| | **PACIFIC (Cont'd)** | | |
| 208 | Oakland | B | 4900 5000 |
| 209 | Redwood City | A | 950 |
| 210 | Reno (Nev.) | B | 1625 |
| 211 | Sacramento | C | 3700 |
| 213 | Salinas | A | 2600 2500 |
| 213 | San Jose | B | 2800 2850 |
| 214 | Santa Rosa | C | 2600 |
| 215 | Stockton | B | 1750 |
| 215A | Tulare (Cal.) | A | 1575 |
| 216 | Vallejo | C | 1480 |
| 216A | Yuba City (Cal.) | A | 575 |
| 217 | Los Angeles | A | 20000 19700 |
| 218 | Albuquerque (N.Mex.) | B | 1900 |
| 219 | Bakersfield | C | 1875 |
| 220 | El Centro | A | ----- |
| 221 | El Paso (Tex.) | B | 2600 |
| 222 | Glendale | B | 2550 |
| 223 | Hollywood | C | 5200 |
| 224 | Long Beach | A | 3650 |
| 225 | Pasadena | B | 4250 |
| 226 | Phoenix (Ariz.) | A | 3400 |
| 226A | Pomona | A | 1275 |
| 227 | San Bernardino | C | 3500 |
| 228 | San Diego | B | 6300 |
| 229 | San Luis Obispo | C | 1075 |
| 230 | San Pedro (LOMITA) | B | 2450 |
| 231 | Santa Ana | C | 1900 |
| 232 | Santa Barbara | A | 960 |
| 233 | Santa Monica | B | 3000 |
| 234 | So. Los Angeles | C | 5000 |
| 235 | Tucson (Ariz.) | B | 1850 |
| 236 | Van Nuys (Cal.) | C | 2500 |
| | **FOREIGN** | | |
| | International | | 12000 |
| | **CANADA** | | |
| | Toronto | A | 5600 |
| | Brandon | A | |
| | Calgary | A | 900 |
| | Edmonton | B | 1025 |
| | Fort William | A | |
| | Geraldton | A | |
| | Halifax | C | 975 |
| | Hamilton | A | 1100 |
| | Kingston | A | |
| | Kitchener | B | |
| | Lethbridge | A | 315 |
| | London (Ont.) | A | 1100 |
| | Medicine Hat | A | 60 |
| | Moncton | A | 450 |
| | Montreal | B | 6200 |
| | Moose Jaw | A | 90 |
| | Nelson | A | 45 |
| | New Westminster | B | 385 |
| | North Bay | A | |
| | Ottawa | B | 1200 |
| | Peterborough | A | 400 |
| | Prince Albert | A | 50 |
| | Prince George | A | 55 |
| | Prince Rupert | B | 100 |
| | Quebec City | A | 125 |
| | Regina | A | 775 |
| | Sarnia | A | 235 |
| | Saskatoon | A | 145 |
| | Sault Ste. Marie | A | 375 |
| | Sherbrooke | A | 215 |
| | St. Anne De Grocetot | A | |
| | St. Catharines | A | 95 |
| | St. John | C | 775 |
| | St. John's (NFTD) | A | 800 |
| | Stratford | A | 90 |
| | Sudbury | A | |
| | Sydney | B | |
| | Timmins | A | |
| | Trail | A | 80 |
| | Trois Rivieres | A | 155 |
| | Vancouver | B | 2450 |
| | Verdun | A | 125 |
| | Victoria | B | 725 |
| | Windsor | A | 775 |
| | Winnipeg | B | 1670 |
| | BRANCH TOTAL | | 1,159,805 |
| | PEG. DEL.* | | 49,160 |
| | GRAND TOTAL | | 1,208,965 |
| | **ABC FOREIGN** | | |
| | HAVANA | | 450 |
| | MEXICO | | 475 |
| | CRISTOBAL | | 350 |
| | PANAMA CITY | | 1000 |
| | SAN JUAN | | 850 |
| | MANILA | | 1700 |
| | | | 4825 |

100 Surplus #600

50 Surplus #600

150 Surplus #600

322 Damaged 322 Surplus #598

100 " "

150 Surplus #514.

250 Surplus #600

25 " "

25 " "

50 " "

100 " "

50 " "

Malaybalay #600

100 Surplus #577

50 Shipside #600

303 Surplus #603


168A Joplin C 675
168B Lawton (Okla.) A 725
169 Oklahoma City B 3650
170 Springfield (Mo.) B 1100
170A St. Joseph (Mo.) C 1500
171 Topeka (Kans.) C 1900
172 Tulsa A 2575
173 Wichita (Kans.) B 2750
174 St. Louis B 11250 11750
174A Mt. Vernon (Ill.) B 1625
W. SO. CENTRAL
175 New Orleans A 4900
176 Baton Rouge B 1550
176A Gulfport (Miss.) C 1150
177 Jackson (Miss.) B 1525
178 Mobile C 1725
178A Monroe (La.) C 1125
178B Pensacola A 1500
179 Shreveport B 2300
179A Texarkana (Ark.) C 1150
180 Texas B 6600
181 Abilene A 1950
182 Amarillo B 2300
183 Fort Worth C 2900
184 Lubbock A 1625
185 Odessa (Tex.) A 440
186 Tyler C 1950
186A Waco A 2000
186B Wichita Falls C 1475
FOREIGN
International 12000
CANADA
Toronto A 5600
Brandon A
Calgary A 900
Edmonton B 1025
Fort William A
Geraldton A
Halifax C 975
Hamilton A 1100
Kingston A
Kitchener B
Lethbridge A 315
London (Ont.) A 1100
Medicine Hat A 60
Moncton A 450
Montreal B 6200
Moose Jaw A 90
Nelson A 45
New Westminster B 385
North Bay A
Ottawa B 1200
Peterborough A 400
Prince Albert A 50
Prince George A 55
Prince Rupert B 100
Quebec City A 125
Regina A 775
Sarnia A 235
Saskatoon A 145
Sault Ste. Marie A 375
Sherbrooke A 215
St. Anne De Grocetot A
St. Catharines A 95
St. John C 775
St. John's (NFTD) A 800
Stratford A 90
Sudbury A
Sydney B
Timmins A
Trail A 80
Trois Rivieres A 155
Vancouver B 2450
Verdun A 125
Victoria B 725
Windsor A 775
Winnipeg B 1670


187 Houston B 7900 7600
188 Austin C 2050
188A Beaumont A 2625
188B Corpus Christi B 2275 2517
188C Galveston (Tex.) B 1400 1450
188D Harlingen (Tex.) C 1175
188E San Antonio A 3750

MOUNTAIN
189 Colorado A 6400 6700
190 Cheyenne (Wyo.) C 900
191 Colorado Springs B 900
192 Utah B 3150
193 Boise C 1000
194 Butte B 2750
194A Ogden (Utah) A 1100
195 Pocatello (Idaho) A 975 125

PACIFIC
196 Puget Sound A 6600 6850
196A Anchorage (Alaska) A 1100
196B Fairbanks (Alas.) A 550
197 Aberdeen B 6500 625
197A Bremerton A 925 750
198 Everett C 800
198A Paso A 6600 685
199 Spokane B 3200 3350
200 Tacoma B 3400 3450
201 Yakima C 1025
202 Oregon B 6800 6900
202A Eugene B 1250
202B Klamath Falls (Ore.) C 425
203 Medford A 925
204 Salem C 1625
205 San Francisco A 22000 23100
206 Berkeley A 3900 3850
207 Fresno C 2175
207A Modesto (Cal.) B 1575

PACIFIC (Cont'd)
208 Oakland B 4900 5000
209 Redwood City A 950
210 Reno (Nev.) B 1625
211 Sacramento C 3700
213 Salinas A 2600 2500
213 San Jose B 2800 2850
214 Santa Rosa C 2600
215 Stockton B 1750
215A Tulare (Cal.) A 1575
216 Vallejo C 1480
216A Yuba City (Cal.) A 575
217 Los Angeles A 20000 19700
218 Albuquerque (N.Mex.) B 1900
219 Bakersfield C 1875
220 El Centro A -----
221 El Paso (Tex.) B 2600
222 Glendale B 2550
223 Hollywood C 5200
224 Long Beach A 3650
225 Pasadena B 4250
226 Phoenix (Ariz.) A 3400
226A Pomona A 1275
227 San Bernardino C 3500
228 San Diego B 6300
229 San Luis Obispo C 1075
230 San Pedro (LOMITA) B 2450
231 Santa Ana C 1900
232 Santa Barbara A 960
233 Santa Monica B 3000
234 So. Los Angeles C 5000
235 Tucson (Ariz.) B 1850
236 Van Nuys (Cal.) C 2500

FOREIGN
International 12000

CANADA
Toronto A 5600
Brandon A
Calgary A 900
Edmonton B 1025
Fort William A
Geraldton A
Halifax C 975
Hamilton A 1100
Kingston A
Kitchener B
Lethbridge A 315
London (Ont.) A 1100
Medicine Hat A 60
Moncton A 450
Montreal B 6200
Moose Jaw A 90
Nelson A 45
New Westminster B 385
North Bay A
Ottawa B 1200
Peterborough A 400
Prince Albert A 50
Prince George A 55
Prince Rupert B 100
Quebec City A 125
Regina A 775
Sarnia A 235
Saskatoon A 145
Sault Ste. Marie A 375
Sherbrooke A 215
St. Anne De Grocetot A
St. Catharines A 95
St. John C 775
St. John's (NFTD) A 800
Stratford A 90
Sudbury A
Sydney B
Timmins A
Trail A 80
Trois Rivieres A 155
Vancouver B 2450
Verdun A 125
Victoria B 725
Windsor A 775
Winnipeg B 1670

BRANCH TOTAL 1,159,805
PEG. DEL.* 49,160
GRAND TOTAL 1,208,965

ABC FOREIGN
HAVANA 450
MEXICO 475
CRISTOBAL 350
PANAMA CITY 1000
SAN JUAN 850
MANILA 1700
4825

1163 907 Total Ex
99 360 " P.D.
1213 967

Check Total
1213 617
-350
1213 267

[fol. 139] LOOK

Issue May 23, 1950

| | |
|---|---|
| Manchester | |
| St. Johnsbury | 350 |
| Greenfield, Mass. | |
| Claremont | 600 |
| Altoona | |
| Johnstown | 1400 |
| Uniontown | |
| Clarksburg | |
| Washington | 775 |
| McKeesport | |
| Greensburg | 800 |
| New Kensington | |
| Du Bois | 575 |
| Camden | |
| Bridgeton | 1100 |
| Hagerstown | |
| Winchester | 550 |
| Williamsport | |
| Sunbury | 750 |
| Greensboro | |
| Burlington, N. C. | 400 |
| Gadsden | |
| Anniston | |
| Huntsville | 365 |
| Columbia | |
| Spartansburg | |
| Columbus | |
| Albany | 550 |
| Tallahassee | 650 |
| Valdosta | 85 |
| Montgomery | |
| Dothan | 300 |
| Southern | |
| Brunswick | |
| Gainesville | 300 |
| Waycross | |
| Daytona Beach | |
| St. Augustine | 365 |
| Orlando | |
| Ocala | 310 |
| Joliet | |
| Ottawa | 950 |
| Sangamon | |
| Jacksonville | 850 |
| South Bend | |
| Michigan City | 975 |
| Tri-City | |
| Dubuque, Iowa | 735 |
| Battle Creek | |
| Jackson, Mich. | |
| Kalamazoo | |
| Benton Harbor | 875 |
| Akron | |
| Alliance, Ohio | |
| Zanesville | |
| Newark, Ohio | 825 |

Package Deliveries

| | |
|---|---|
| Huntington | |
| Williamson | 200 |
| Kingsport | |
| Middlesboro | 625 |
| Nashville | |
| Bowling Green | 400 |
| Shelbyville | 550 |
| Memphis | |
| Blytheville | 340 |
| Jonesboro | 320 |
| Poplar Bluff | 275 |
| Tupelo | 290 |
| Georgia | |
| Rome | 575 |
| Greenwood | |
| Columbus | 400 |
| Greenville | 350 |
| Jackson, Tenn. | |
| Paducah | 240 |
| Little Rock | |
| Hot Spring | 675 |
| Pine Bluff | 775 |
| Minnesota | |
| St. Cloud | 525 |
| Willmar | 525 |
| New Ulm | 320 |
| Eau Claire | 560 |
| Red Wing | 485 |
| Fargo | |
| Minot, N. D. | 500 |
| Omaha | |
| Creston | 315 |
| Fort Dodge | 210 |
| Sioux Falls | |
| Brookings | 320 |
| Mitchell | 365 |
| Watertown | 400 |
| South West | |
| Chanute | 380 |
| Higginsville | 310 |
| Joplin | |
| Rogers | 240 |
| Fayetteville | 390 |
| Lawton | |
| Hobart | 350 |
| Oklahoma | |
| Durant | 220 |
| Shawnee | 375 |
| Springfield, Mo. | |
| Rolla | 255 |
| St. Joseph | |
| Chillicothe | 270 |
| Topeka | |
| Emporia, Kans. | 370 |
| Clay Center | 330 |

Shipped Direct

| | |
|---|---|
| Wichita | |
| Oklahoma-Kans. | 280 |
| Hutchinson | 625 |
| Dodge City | 490 |
| Tulsa | |
| Bartlesville | 310 |
| Fort Smith | 125 |
| McAlester | 260 |
| Stillwater | 325 |
| Coffeyville | 305 |
| St. Louis | |
| Columbia | 775 |
| Quincy | 750 |
| Cape Girardeau | 190 |
| Gulfport | |
| Hattiesburg | 500 |
| New Orleans | |
| Lafayette | 875 |
| Jackson | |
| Natchez | 600 |
| Monroe | |
| Alexandria | 650 |
| Texarkana | |
| El Dorado | 200 |
| Texas | |
| Greenville | 400 |
| Denton | 400 |
| Paris | 350 |
| Abilene | |
| Brownwood | |
| San Angelo | 625 |
| Houston | |
| Bryan | 500 |
| Victoria | 425 |
| Tyler | |
| Lufkin | 360 |
| Colorado | |
| Durango | 200 |
| Colo. Springs | |
| La Junta | 285 |
| Trinidad | 130 |
| Cheyenne | |
| Alliance, Nebr. | 120 |
| Sterling | 315 |
| Thermopolis | 230 |
| Utah | |
| Price | 115 |
| Boise | |
| Ontario, Ore. | 315 |
| La Grande | 90 |
| Butte | |
| Cody | 210 |
| Pocatello | |
| Twin Falls | 525 |
| Aberdeen | |
| Centralia | 225 |

Issue May 23, 1950

Package Deliveries

| | |
|---|---|
| Bremerton | |
| Port Angeles | 215 |
| Everett | |
| Bellingham | 415 |
| Mt. Vernon | 450 |
| Pasco | |
| Pendleton | 325 |
| Walla Walla | 420 |
| Yakima | |
| Wenatchee | 255 |
| Ellensburg | 345 |
| Oregon | |
| Astoria | 350 |
| Klamath Falls | |
| Bend | 285 |
| Eugene | |
| Roseburg | 245 |
| Medford | |
| Yreka | 220 |
| Salinas | |
| Santa Cruz | |
| Santa Rosa | |
| Eureka | 165 |
| Yuba City | |
| Chico | 500 |
| Redding | 500 |
| Los Angeles | |
| Whittier | |
| Albuquerque | |
| Callup | |

Shipped Direct

| | |
|---|---|
| El Paso | |
| Carlsbad | 325 |
| Silver City | |
| Santa Barbara | |
| Oxnard | |
| Ventura | 1000 |
| Ottawa | |
| Cornwall | 185 |
| Vernon | |
| Kamloops | 65 |
| San Diego | |
| El Centro | 550 |

P. D. Total: 49,360.

[fol. 140] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS OR IN LIEU THEREOF TO QUASH RETURN OF SERVICE OF ADDITIONAL SUMMONS—Filed September 18, 1951.

For the special and limited purpose of raising the question of jurisdiction, the defendant, not appearing generally or submitting itself or consenting to the jurisdiction of the Court and without waiving any defenses or objections which may be available to it, moves the Court to dismiss this action or in lieu thereof to quash the return of purported or attempted service of the additional summons on the grounds that:

1. The defendant has not been properly served with process in this action. Purported or attempted service of a copy of the summons and complaint on Paul T. Briardy, as recited in the return of purported or attempted service of the additional summons herein, is not constitutional, legal or effective service upon the defendant for the reasons that:

(a) Paul T. Briardy is not, was not at the time of such purported or attempted service and has never been an officer, a managing or general agent, or an agent authorized by appointment or by law to receive service of process for the defendant;

(b) Such purported or attempted service was not authorized by any statute of the United States or by the law of the State of Florida;

[fol. 141] 2. The defendant was not and is not subject to the service of process within the State of Florida. The defendant is a corporation organized under the laws of Iowa and was not doing or carrying on business in Florida at the time of such purported or attempted service and is not doing and has never done business within the State of Florida so as to be present in Florida and has not appointed an agent for service of process in such state;

all of which more clearly appears in the affidavit of Marvin C. Whatmore which is Exhibit A of defendant's first Motion to Dismiss and appears on pages 23-25 of the Certified Copy of the Record in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, previously filed in this cause by order of Court and in the depositions

of Marvin C. Whatmore and Paul T. Briardy previously filed by the plaintiff in this cause.

(S.) Loftin Anderson Scott McCarthy & Preston,
(S.) Will M. Preston, Attorneys for the Defendant.

627 Ingraham Building, Miami, Florida.

Certificate of service omitted.

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[fol. 142] In United States District Court

Order—August 9, 1951

Upon defendant's motion to amend its Motion to Dismiss or in Lieu Thereof to Quash Return of Service of Additional Summons so as to include the deposition of Raymond J. Jennings in support of such Motion which motion to amend was made orally before the Court at the Hearing on defendant's Motion to Dismiss or in Lieu Thereof to Quash Return of Service of Additional Summons.

It is ordered that such motion to amend is granted and the last three lines of defendant's Motion to Dismiss or in Lieu Thereof to Quash Return of Service of Additional Summons are amended to read as follows:

"by order of Court and in the depositions of Marvin C. Whatmore, Raymond J. Jennings, and Paul T. Briardy [fol. 143] previously filed by the plaintiff in this cause."

Done and Ordered at Miami, Florida, this 8 day of August, 1951.

(S.) George W. Whitehurst Judge.

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In United States District Court

Order—August 29, 1951

This cause came on to be heard on defendant's motion to dismiss or, in lieu thereof, to quash return of service of additional summons, and the Court, having considered the motion and the proof offered by the parties on said motion, finds as a matter of fact that defendant was not, at the time of the service of the summons, doing business in this district and that, therefore, this Court does not have juris-

diction under Section 1391, sub-section C, New Title 28, United States Code. It is, therefore,

Ordered and adjudged that the clerk shall enter judgment dismissing this cause at costs of plaintiff.

Done and ordered in chambers, at Miami, Florida, this 29th day of August, A. D. 1951.

(S.) George W. Whitehurst, United States District Judge.

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[fol. 144] In United States District Court

Final Judgment—August 29, 1951

This cause came on for hearing before the Court at which time an Order was entered that this Court does not have jurisdiction and dismissing the cause at the cost of plaintiff, it is

Ordered and adjudged that the above cause is dismissed and that costs are taxed to the plaintiff,

Done and ordered at Miami, Florida, this 29th day of August, 1951.

Edwin R. Williams, Clerk U. S. District Court, by (S.) Anna M. Fitzsimmons, Deputy Clerk. (Seal.)

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In United States District Court

Notice of Appeal—Filed September 27, 1951

[Title omitted]

Notice is hereby given that Al Polizzi, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit, from that certain order made [fol. 145] and entered by the District Judge of the United States District Court for the Southern District of Florida, dated August 29, 1951, and entered in Civil Order Book 22, at page 851, and from that certain final judgment dismissing the plaintiff's cause, made and entered by the Clerk of the United States District Court for the Southern District of Florida, dated August 29, 1951, and entered in Civil Order Book 22, at page 852.

(S.) John D. Marsh, Attorney for Appellant.

801 Biscayne Building, Miami, Florida.

Receipt of a copy of the above and foregoing notice of appeal is acknowledged, this 27th day of September, 1951.

Loftin, Anderson, Scott, McCarthy and Preston, by Mary Ann Brown.

On September 27, 1951, Plaintiff's Cost Bond on Appeal was filed.

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[fol. 146] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY—Filed September 27, 1951

The appellant, Al Polizzi, makes the following statement of points upon which he intends to rely in his ap-eal herein:

1. The District Court erred in ordering the dismissal of the plaintiff's cause, by order dated August 29, 1951, and entered in Civil Order Book 22 at page 851.

(S.) John D. Marsh, Attorney for Appellant.

Certificate of service omitted.

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[fol. 147-149] DESIGNATION OF CONTENTS OF RECORD—Filed September 27, 1951 (Omitted in printing)

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[fol. 150] STIPULATION CORRECTING DESIGNATION OF CONTENTS OF RECORD—FILED October 8, 1951 (Omitted in printing)

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[fols. 151-152] DESIGNATION BY APPELLEE OF ADDITIONAL PORTIONS OF RECORD—Filed October 5, 1951 (Omitted in printing)

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[fol. 163] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 154] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

No. 13858

ARGUMENT & SUBMISSION

AL POLIZZI

versus

COWLES MAGAZINES, INC.

On this day this cause was called, and after argument by Tom Whitaker, Esq., and John D. Marsh, Esq., for appellant, and Arthur E. Farmer, Esq., for appellee, was submitted to the Court.

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[fol. 155] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13858

AL POLIZZI, Appellant,

versus

COWLES MAGAZINES, INC., Appellee

Appeal from the United States District Court for the Southern District of Florida

OPINION—Filed May 23, 1952

Before Hutcheson, Chief Judge, and Borah, and Russell, Circuit Judges

HUTCHESON, Chief Judge:

Filed in the Circuit Court of Dade County, Florida, against defendant, a corporation duly organized and existing under the laws of Iowa, publisher of the national weekly magazine, "Look," the suit was for libel based on matter appearing in its issue of May 23, 1950, charging plaintiff

with being a member of the Mafia, a criminal gang of great force and power.

[fol. 156] Removed into the United States District Court for the Southern District of Florida, it was there dismissed under Sec. 1391(c), Title 28 U. S. C., for want of jurisdiction on the ground that defendant was not doing business in the district.

Appealing from that judgment, appellant, plaintiff below, is here insisting that, on the undisputed facts,[1] as shown in

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[1] While they are more fully elaborated and differently emphasized by appellee, the facts, as fairly summarized in appellant's brief, are:

On July 10, 1950, the defendant appeared specially in the State Court to contest jurisdiction and, on July 12, 1950, filed in the District Court a petition to remove the cause to the District Court, and the record of proceedings in the State Court were filed in the District Court.

On September 8, 1950, an additional summons directed to appellee was issued out of the District Court and the return thereto reflects that the summons was served upon appellee by delivering a copy thereof together with a copy of the complaint to Paul T. Briardy, "as a managing agent of such defendant corporation transacting business for it in the State of Florida, * * *."

The return also recites that Mr. Briardy "denied that he was such agent or was transacting business for Cowles Magazines, Inc., in the State of Florida or was a person authorized to accept process for the defendant."

On Sept. 18, 1950, the appellee, appearing specially, moved in the District Court to dismiss or in lieu thereof to quash return of service of the additional summons, and the motion, as amended, was granted.

The depositions of Marvin C. Whatmore, vice-president and business manager and director of the appellee corporation, and of Paul T. Briardy, who described himself as a "Circulation Road Man", were taken by the appellant for the purpose of establishing that the appellee was, and is, doing business in the State of Florida, so as to be amenable to service in that state, and that Briardy was an agent transacting business for it in Florida.

The appellee company was incorporated in Iowa and

the depositions of Briardy, the employee of defendant [fol. 157] served, and of Whatmore, defendant's vice-president, business manager, and director, the district court [fol. 158] was wrong in finding that the defendant, appellee

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maintains offices there in Des Moines. Offices are maintained in various other cities not in Florida. It has not qualified to do business in Florida, has no bank accounts there, nor any books or records, maintains no telephone listing there and no officers, directors or employees except Mr. Briardy work in the state.

As pertains to newsstand sales, orders for Look Magazine received from wholesale distributors are sent to a bindery, an independent contractor in Chicago, which fills the individual orders by shipping the magazines to the wholesalers by common carriers.

The magazines are distributed to newsstand retail dealers in Florida by the American News Company and, in the Panama City area, by Cooper News Company who are described as independent wholesalers. Average issue circulation in Florida is about 48,000 copies.

In addition to newsstand sales magazines are mailed to individual susbcribers. Fifty percent of individual subscriptions in Florida have been procured through direct mail. Other subscribers in the state "have purchased subscriptions through agents—agents selling the subscriptions and sending the order to us with cash" and there has been a consistent practice in the past to have subscription agents in Florida to sell subscriptions. These agents are, in many cases, large companies operating out of New York or Philadelphia. They employ crews which tour the country and at times get into Florida. Crew members are employees of the subscription agency houses. Such agents do not solicit exclusively for the appellee but for many other magazine publishers as well.

There are a few part-time subscription salesmen or agents actually operating in Florida. These produce no more than 250 out of 10,000 subscriptions obtained annually. They work on a pre-determined commission basis and withhold this commission from the amount collected. The balance is remitted with the order to the subscription office

here, was not doing business in the district at the time of service, and in adjudging that it did not have jurisdiction under Sec. 1391(c), Title 28 U. S. C., appellee, defendant below, as strongly insists that the judgment was right and must be affirmed.

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in Des Moines. Subscriptions are subject to acceptance only by the appellee.

Over the years writers in the employ of the appellee have gone into Florida for material and information.

The appellee places advertising in newspapers throughout the country and Mr. Whatmore stated that he was sure, "subject to check," that advertising had been placed in Florida newspapers in order to promote sales and increase circulation.

Circulation is important both as a source of revenue and as a basis for advertising rate structure. The company employs, on its circulation staff, road men or district men formerly called "assistant circulation managers" to follow up complaints and check magazine shortages. Paul T. Briardy is so employed for the southeast district composed of Florida, South Carolina, Mississippi, Alabama and Georgia. His duties are to travel the territory regularly, check retail outlets to find out about conditions, make sure the company gets proper positions on newsstands "and in general get the most efficient sale possible". "You might say he is a promotion and complaint man." He must see that there is proper display, write the company in New York if the retailer does not get enough copies, or call the local branch manager of the American News Company. His function is to increase circulation to the best of his ability.

He has no authority to commit the company to any expenses except his own traveling expense which includes postage for his reports and telegraph and telephone charges.

Mr. Briardy testified that he has no place of residence; that he travels out of a suitcase from town to town. He said, "I have no place except a letter drop in Miami, and all other mail in hotels."

He drives his own car for which the company pays him a flat rate of $30.00 per week. This includes everything in-

Citing many cases [2] holding that there must be substantial prosecution, with its authority, of some essential business of the corporation within a state before it can be said that the foreign corporation is doing business there, to an extent sufficient to justify a court in asserting jurisdiction over it, appellee insists that the finding and judgment of the court are in full accord with established principles.

It particularly relies on cases dealing with libel suits against publishers of magazines, such as *Street & Smith Publications, Inc. v. Spikes*, 120 F(2) 895; *Cannon v. Time, Inc.*, 115 F(2) 423; *Whitaker v. MacFadden Publications*, 105 F(2) 44; *Neely v. Philadelphia Inquirer Co.*, 62 F(2) 873; *Layne v. Tribune Co.*, 71 F(2) 223.

Appellant in its turn urges upon us that *International Shoe Co. v. Washington*, 326 U. S. 310, represents, and has brought about a change in, the decisions, and that with and since that decision, it has taken very little evidence of the presence in a state of a corporate representative to support [fol. 159] a finding that it was doing business there, citing in support *French v. Gibbs Corp.*, 189 F(2) 787 and *Consolidated Cosmetics v. D-A Pub. Co., Inc.*, 186 F(2) 906.

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cident to the use of the car in the performance of his duties. His salary is $75.00 per week.

His time is fairly well proportioned among the five states of his territory. He spends a considerable portion of his time in Florida and he tries to follow a regular itinerary.

In addition to other duties Mr. Briardy also occasionally puts up advertising displays in retail stores. He obtains some of these displays from the News Company and occasionally a few are sent to him from the appellee company.

Mr. Whatmore stated that advertising displays are sent direct to retailers by the appellee's New York office and also may be included in individual magazine bundles.

[2] International Shoe Co. v. Washington, 326 U. S. 310; Consolidated Textile Corp. v. Gregory, 289 U. S. 85; Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333; Peoples Tobacco Co. v. American Tobacco Co., 246 U. S. 79; Philadelphia & Reading Co. v. McKibbin, 243 U. S. 264; Green v. Chicago B & Q R. Co., 205 U. S. 530; Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602; Steinway v. Majestic Amusement Co., 179 F. (2) 681.

Insisting that if this is not so, the court, in *International Shoe Co., supra,* merely again applied the earlier case of *International Harvester v. Kentucky,* 234 U. S. 579, and that the decision of the Supreme Court of Florida, in *Hormel & Co. v. Ackman,* 158 So. 171, fully supports its contention that there was jurisdiction here, appellant further insists that appellee and the district judge are unduly narrowing the meaning of doing business as discussed in the authorities and prescribed in 1391 (c).

We do not think so. Instead of this being a stronger case for jurisdiction than some of the others cited, we think it is a much weaker one. Indeed, we think the claim that this company was doing business in Florida is completely refuted by the detailed testimony of Briardy and Whatmore. In three recent cases, this court has had occasion to consider and review the state of the law in connection with situations of this kind. In *Employers Liability v. LeJeune,* 189 F(2) 521, *Rosenthal v. Frankfort Distillers* and *Rosenthal v. Glazer's Wholesale Drugs Co.,* 193 F(2) 137, and in *Pacific Employers Ins. Co. etc. v. Parry Navigation Co., etc.* (decided 4-1-52), citing and reviewing the authoritative cases, we have pointed out that no such showing of doing business was made there as would justify the exercise of jurisdiction.

We think this is equally true here. It is true that the approach of some of the recent opinions to the question under review has seemed less rigid in its requirements for [fol. 160] jurisdiction than the earlier approach. We think, though, that they, and the new statute which embodies them, must be regarded, not as changing, but as restating and clarifying, the law. They certainly do not furnish warrant for the view pressed upon us by appellant that, because of the activities of Briardy here, the company can be said to be doing business in the state so as to be subject to suit there.

The judgment was right. It is

Affirmed.

RUSSELL, Circuit Judge, dissenting:

The majority opinion sets forth the facts of the case and also the appellant's contentions and citations of the applicable law. I think the authorities relied upon for reversal require that result since, in my opinion, the facts present

sale and the promotion thereof) amounted to "doing business" within the State of Florida; the injury claimed, if existent, is connected with such activities; and the defendant had an agent in Florida upon whom service could properly be effected. Florida Statutes Annotated, Section 47.17 (5). I respectfully dissent.

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[fol. 161] No. 13858

AL POLIZZI

versus

COWLES MAGAZINES, INC.

JUDGMENT—Filed May 23, 1952

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Al Polizzi, and the surety on his appeal bond herein, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Russell, Circuit Judge, dissents."

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[fol. 162] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 162] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 287

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 20, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

Office - Supreme Court, U. S.
FILED
AUG 20 1952
CHARLES ELMORE CROPLEY

# Supreme Court of the United States

LIBRARY
SUPREME COURT, U.S.

OCTOBER TERM, 1952.

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No. 287

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AL POLIZZI, PETITIONER,

VS.

COWLES MAGAZINES, INC., RESPONDENT.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

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JOHN D. MARSH,
*Counsel for Petitioner.*

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# Supreme Court of the United States

OCTOBER TERM, 1952.

No. _____

AL POLIZZI, PETITIONER,

VS.

COWLES MAGAZINES, INC., RESPONDENT.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner, AL POLIZZI, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit (R. 161) entered in this cause.

## OPINIONS BELOW.

The opinion in the Court of Appeals (R. 155-160) has been reported in 197 F. 2d 74.

## JURISDICTION.

Judgment was entered on May 23rd, 1952, by the Court of Appeals, for the Fifth Circuit. The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 1254.

## QUESTIONS PRESENTED.

1. Where an Iowa corporation, the owner of a largely distributed magazine employed all its circulation staff, salaried district men, formerly called assistant circulation managers and where such a district man was assigned an area composed of Florida, South Carolina, Mississippi, Alabama and Georgia whose duties were to continually travel the territory to check with regular, systematic, periodic frequency the retail sales-outlets of independent wholesale magazine dealers, arrange with such retail sales-outlets for better display of such magazine and provide and arrange poster display advertising in such retail-outlets promoting the sales of the magazine and see that sufficient numbers of copies were provided retail-outlets, promoting generally the sales and circulation of such magazine in the territory, periodically mail written reports to the New York office of respondent relating to complaints of retailers of insufficient copies or lack of promptness in delivery, meet with wholesale distributors to check and correct complaints of retail-outlets and that such wholesalers use such special poster display advertising material furnished by respondent together with the solicitation of subscriptions by independent agents in Florida and sent direct to respondent and collection by such agents of subscription charges from subscribers in the State of Florida and transmission of such collections less commissions were mailed directly to the respondent, together with

the acceptance of direct mail subscriptions from Florida by respondent in Iowa and the delivery of magazines by mail directly to said subscribers, are such corporate activities sufficient to subject respondent to process in the State of Florida in an action of libel based on libelous statements concerning petitioner, a resident of Florida and published and broadcast in the State of Florida in such magazine owned by respondent?

2. Did the Court of Appeals err in failing to follow herein the formula of this Court laid down in *International Shoe Company* v. *State of Washington, Office of Unemployment Compensation and Placement,* (1945) 66 S. Ct. 154, 326 U. S. 310, that due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice?

## STATUTES INVOLVED.

The governing statute of Florida, Florida Statutes Annotated, Section 47.17, provides that if a foreign corporation shall have none of the following officers or agents in the state, viz.: president, vice-president, or other head of the corporation, or cashier, treasurer, secretary or general manager, any director or officer or business agent, resident in the state, then

> "service may be had upon any agent transacting business for it in the State."

The provisions of the Federal Rules of Civil Procedure pertaining to service of process on the questions raised are

found in Sub-sections (d) (3) and (d) (7) of Rule 4, 28 U. S. C. A., which provides as follows:

"(d) Summons: Personal Service. The summons and complaint shall be served together. The Plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows: * * *

"(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. * * *

"(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

## STATEMENT.

The libel suit of petitioner was originally instituted in a state court of Florida to recover damages of respondent, an Iowa corporation, as the owner of Look Magazine, as the result of false and libelous statements concerning petitioner, a resident of Florida. Jurisdiction of the state court was contested (R. 19) and the case was removed

by respondent to the United States District Court. An additional summons and copy of complaint was served on Paul T. Briardy (R. 57) as a managing agent of respondent transacting business for it in the State of Florida. The return recited that Briardy denied he was such agent or was transacting business for respondent in Florida or was a person authorized to accept process for respondent. Depositions of Paul T. Briardy (R. 58-93) and Marvin C. Wahatmore (R. 94-139) were taken by petitioner for the purpose of establishing respondent's corporate activities in Florida so as to be subject to process in that state and that Briardy was an agent transacting business for it in Florida.

The ultimate facts of corporate activities in Florida recited in petitioner's Number One (1) of Questions Presented herein were established by such depositions.

The respondent owns and publishes Look Magazine. It is an Iowa corporation and maintains offices in Des Moines (R. 96) and offices are maintained in other cities not in Florida (R. 97). It has not qualified to do business in Florida, has no bank accounts there, maintains no telephone listing and has no officers, directors or employees other than Mr. Briardy (R. 131) in Florida.

Orders for Look Magazine are received from wholesale distributors and are sent to a bindery, an independent contractor in Chicago which filled individual orders by shipping direct to independent wholesalers by common carriers (R. 129).

The magazines were distributed to news stand retail dealers in Florida by two independent wholesalers (R. 101-103). Average circulation issue in Florida is 48,000 copies (R. 101). In addition full and part time independent subscription salesmen augment news stand sales

in Florida by mailed copies direct to subscribers by respondent. The collections less commissions are remitted to the subscription office in Des Moines.

Circulation is important as a source of revenue and as a basis for advertising rate structure (R. 99). Respondent employs on its circulation staff; road or district men formerly called assistant circulation managers to continually travel their assigned territories. Paul T. Briardy was so employed for Florida, South Carolina, Mississippi, Alabama and Georgia (R. 107, 64). He was on salary and his duties were to check with regular, periodic frequency retail sales-outlets of the wholesalers, and arrange with retail-outlets for better display of Look Magazines and for poster display advertising and to promote sales of the periodical and see that sufficient numbers of copies were provided retail-outlets, promote the sales and circulation in the territory, periodically mail written reports to respondent relating to retail-outlet complaints as to delivery or insufficient copies, meet with wholesalers to check and correct complaints of retailers and urge wholesaler to use poster advertising material furnished by respondent and correct complaints of retailers. His function was to increase circulation to the best of his ability (R. 108, 65, 66, 74). He had no place of residence and had a letter drop in Miami, Florida, and received all other mail in hotels. (R. 60). His time was fairly well proportioned among the five (5) states of his territory and spent considerable portion of his time in Florida (R. 91-92) and tried to follow a regular itinerary (R. 69).

Advertising displays were also sent direct to retailers by respondent's New York office and also were included in individual magazine bundles (R. 110) to the independent wholesalers. Respondent also accepted direct mail subscriptions in Iowa from subscribers in Florida.

The District Court (R. 143) found respondent was not, at the time of the service of summons, doing business in the federal district of the Court and that the Court did not have jurisdiction under Section 1391, sub-section C, New Title 28, United States Code and entered a final judgment dismissing the action *in personam*. An appeal was duly taken to the Court of Appeals for the Fifth Circuit and the judgment of the District Court was affirmed in an opinion (R. 155) as yet unreported.

## SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In affirming the final judgment of dismissal of the District Court holding that respondent was not doing business in the District at the time of the service of summons.
2. In affirming the final judgment of dismissal of the District Court determining that the District Court did not have jurisdiction.

## REASONS FOR GRANTING THE WRIT.

The narrow, rigid construction placed by the Court of Appeals herein (R. 159-160) of the term doing business applied to the corporate activities of respondent is in direct conflict with the opinion of this Court in *International Shoe Company* v. *State of Washington, Office of Unemployment Compensation*, (1945) 66 S. Ct. 154, 326 U. S. 310, that due process requires only that in order to subject a defendant to a judgment *in personam* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. See appendix, *infra*, pp. 12-14.

The Court of Appeals of the Fifth Circuit (R. 159-160) held herein:

> "* * * It is true that the approach of some of the recent opinions to the question under review has seemed less rigid in its requirements for jurisdiction than the earlier approach. We think, though, that they, and the new statute which embodies them, must be regarded, not as changing, but as restating and clarifying, the law. They certainly do not furnish warrant for the view pressed upon us by appellant that, because of the activities of Briardy here, the company can be said to be doing business in the state so as to be subject to suit there."

The dissenting opinion (R. 160) of Russell, Circuit Judge, is as follows:

> "The majority opinion sets forth the facts of the case and also the appellant's contentions and citations of the applicable law. I think the authorities relied upon for reversal require that result since, in my opinion, the facts present show that the activities of the defendant (circulation and sale and the promotion thereof) amounted to 'doing business' within the State of Florida; the injury claimed, if existent, is connected with such activities; and the defendant had an agent in Florida upon whom service could properly be effected. Florida Statutes Annotated, Section 47.17 (5)."

Petitioner's action arose and was filed within the State of Florida. The corporate activities of respondent were not irregular or casual, but were substantial and performed with regular, periodic and systematic frequency. The libel action did not arise from any corporate dealings distinct from its Florida operations as the libelous statements, concerning petitioner, a resident of Florida were broadcast and were primarily affected by the large sale,

circulation and distribution in Florida of the May 23, 1950, issue of the national weekly magazine "Look," charging plaintiff with being a member of the Mafia, a criminal gang of great force and power.

There was no warrant or authority given under the International Shoe Case for the Court of Appeals herein (R. 160) to hold:

> "They certainly do not furnish warrant for the view pressed upon us by appellant that, because of the activities of Briardy here, the company can be said to be doing business in the state so as to be subject to suit there."

The Court of Appeals herein unduly restricted and narrowed the application of the rule laid down in the International Shoe Case. The Court of Appeals for the Fifth Circuit in holding that the new federal rule and the International Shoe Case do not change but merely restate the old fiction and concept of doing business overlooked the ruling of this Court in the case last cited that the practical test now followed seeks to determine not whether the acts of the corporate agent within the state are "a little more or a little less," but rather do the contacts as a whole of the corporation within the forum state make it reasonable to require the corporation to defend a suit there. This Court has in the International Shoe Case recognized the economic desirability that if a corporation is to be allowed to go where it wishes, that it must be liable there for its wrongful activities. In a general sense, this Court by adoption of this new means of measurement has given itself opportunity to reexamine each situation anew until some degree of harmony has been achieved among the Federal Courts of Appeal applying the new base or standard of measurement of for-

eign corporate activity within the state as being sufficient to manifest its presence there.

The petitioner contends the Appellate Court erred in failing to apply the said ruling of this Court in the International Shoe Company Case and such decision is also in conflict with the cases of the First,[1] Second[2] and Seventh[3] circuits which have followed and applied the said ruling of this Court in the International Shoe Company Case.

Was the quality and nature of the activity of appellee's agents in Florida such as to satisfy due process requirements by subjecting respondent to an action *in personam* in Florida after service of process upon one employed in the state by the respondent for the purposes and duties Briardy was hired for as a district man at One Hundred Five Dollars ($105.00) a week? We submit that it was. The main purpose of and reason for the activities of respondent's agents operating in Florida, and especially as regards Briardy, was to induce and encourage more and more people in Florida to purchase and read Look Magazine, the very vehicle carrying the alleged defamatory material of which petitioner complains.

The rationale that undertakes an estimate of the inconveniences and applies as a test whether or not the corporate activity has established sufficient contacts or ties with the state of the forum to make it just and reasonable from a standpoint of fair play to make the foreign corporation amenable to process is well demonstrated in the libel action herein.

---

[1]*Schmikler* v. *Petersime Incubator Co.*, 177 F. 2d 983, 990.

[2]*French* v. *Gibbs Corporation*, 189 F. 2d 781, decided June 7, 1951.

[3]*Consolidated Cosmetics* v. *D-A Pub. Co., Inc.*, 186 F. 2d 706 (1951).

While exercising the privilege of conducting its many activities within the state the respondent enjoyed the benefits and protection of Florida laws.

For example, if the petitioner had sought by force to prevent Briardy from arranging displays of that issue of Look Magazine which carried the allegedly false and libelous matter designed to injure the petitioner's reputation, or disturbed such displays so the people in his community would not have been attracted to purchase and read that issue, he would have been prohibited from doing so by the laws of Florida where he is a citizen.

Certainly then, the "traditional notions of fair and substantial justice" will not be offended if the respondent is called upon to account for its allegedly unwarranted defamation of petitioner's character in the place where that character and reputation is injured by the acts of the respondent, assisted and abetted by its agents.

To require the petitioner to bring this suit in Iowa where he is unknown; the place of respondent's choosing, would indeed offend our traditional notions of fair play and substantial justice.

As was said in *Clements* v. *MacFadden Publication, Inc.*, 28 Fed. Supp. 274:

> "To carry the present line in holdings to any greater extent than they now exist could easily result in a publication two thousand miles away destroying a man's reputation, whether he be great or small, and requiring him to come to unfriendly territory, perhaps, to effect his vindication in the courts of justice. For this reason and for others it is manifest that the shipment and circulation of printed documents should hardly be grouped and classed with ordinary articles of merchandise."

## CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN D. MARSH,
*Counsel for Petitioner.*

August 14, 1952.

## APPENDIX A.

In the interest of brevity, a brief would not supplement without over-emphasis, the matters set forth in the petition.

The pertinent portions of this Court's opinion in the often cited case herein of *International Shoe Company* v. *State of Washington, Office of Unemployment Compensation and Placement,* 326 U. S. 310, 90 L. Ed. 95, are as follows:

> "* * * due process requires only that in order to subject a defendant to a judgment *in personam* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' * * * (cases cited) * * *
>
> "Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein* v. *Tax Supers.*, 282 U. S. 19, 24, 75 L. Ed. 140, 143, 51 S. Ct. 15, 13 A. L. R. 679, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which the courts will deem it be

sufficient to satisfy the demands of due process. L. Hand, Circuit Judge, in *Hutchinson* v. *Chase & Gilbert*, (C. C. A. 2d) 45 F. 2d 141. Those demands may be met by such contacts of the corporation with the state of the forum as makes it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection * * * (case cited) * * *."

The Court, after discussing continuous and systematic activity of a corporation and the casual presence of the corporate agent and his conduct of single or isolated items of activities within a state, said:

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. * * *. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. Cf. *Pennoyer* v. *Neff*, 95 U. S. 714 (and other cases cited) * * *.

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue * * * (cases cited) * * *."

As to service upon one of the salesmen in the state, it was said:

"We are likewise unable to conclude that the service of process within the state upon an agent whose activities established appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952.

## No. 287.

AL POLIZZI, PETITIONER,

VS.

COWLES MAGAZINES, INC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## BRIEF FOR PETITIONER.

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## BRIEF FOR PETITIONER.

### OPINION BELOW.

The opinion of the Court of Appeals (R. 154-160) is reported at 197 F. 2d 74.

## JURISDICTION.

The judgment of the Court of Appeals was entered on May 23, 1952 (R. 115). Petition for Certiorari was filed August 20, 1952, and was granted October 20, 1952. The jurisdiction of this Court is conferred by Title 28, U. S. C., Sec. 1254.

## QUESTIONS PRESENTED.

1. Where an Iowa corporation, the owner of three nationally distributed magazines employed a circulation staff composed of salaried circulation head or district men, formerly called assistant circulation managers and where two of such district men performed services in the same capacity for the corporation in the territories assigned to them in the State of Florida and where service of a summons of a Federal District Court of Florida was served on one of such district men—who was assigned an area composed of Florida, South Carolina, Mississippi, Alabama and Georgia—whose duties were to continually travel such territory to check with regular, systematic, and periodic frequency in his Florida territory the retail sales-outlets of independent wholesale magazine dealers, arrange with such retail sales-outlets for better display of such magazines and provide and arrange poster display advertising in such retail-outlets promoting the sales of the magazines and see that sufficient numbers of copies were provided retail-outlets, promoting generally the sales and circulation of such magazines in such territory, periodically mail written reports to the New York office of respondent relating to complaints of retailers of insufficient copies or lack of promptness in delivery, meet with wholesale distributors to check and correct complaints of retail-outlets

and that such wholesalers use special poster display advertising material furnished by respondent together with the solicitation of subscriptions by independent agents in Florida and sent direct to respondent and collection by such agents of subscription charges from subscribers in the State of Florida and transmission of such collections less commissions were mailed directly to the respondent, together with the acceptance of direct mail subscriptions from Florida by respondent in Iowa and the delivery of magazines by mail directly to said subscribers, were such corporate activities sufficient to subject respondent to such summons of the United States District Court in the State of Florida in an action of libel based on libelous statements concerning petitioner, a resident of Florida and published and broadcast in the State of Florida in Look Magazine, one of said three national magazines owned by respondent?

2. Did the Court of Appeals err in failing to follow herein the formula of this Court laid down in *International Shoe Company* v. *State of Washington, Office of Unemployment Compensation and Placement,* (1945) 66 S. Ct. 154, 326 U. S. 310, that due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice?

## STATUTES INVOLVED.

The governing statute of Florida, Florida Statutes Annotated, Section 47.17, provides that if a foreign corporation shall have none of the following officers or agents in the state, viz.: president, vice-president, or other head of

the corporation, or cashier, treasurer, secretary or general manager, any director or officer or business agent, resident in the state, then

> "service may be had upon any agent transacting business for it in the State."

The provisions of the Federal Rules of Civil Procedure pertaining to service of process on the questions raised are found in Sub-sections (d) (3) and (d) (7) of Rule 4, 28 U. S. C. A., which provides as follows:

> "(d) Summons: Personal Service. The summons and complaint shall be served together. The Plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows: * * *
>
> "(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. * * *
>
> "(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

## STATEMENT.

The libel suit of petitioner, a resident of Florida, was filed in a state Court of Florida to recover damages of respondent, an Iowa corporation, as the owner of the national weekly magazine "LOOK" after an issue of the magazine charged petitioner with being a member of the Mafia, a criminal gang (R. 4-15). Jurisdiction of the state Court was contested (R. 15-22) and the case was removed by respondent to the United States District Court (R. 3). Thereupon a federal summons and copy of complaint was served on Paul T. Briardy (R. 41) as a managing agent of respondent transacting business for it in Florida. The return of the United States Marshal recited Briardy denied he was such agent or was transacting business for respondent in Florida or was a person authorized to accept process for respondent (R. 41).

Depositions of Paul T. Briardy (R. 42-70) and Marvin C. Whatmore, Vice-President and business manager of respondent (R. 70-104) were taken by petitioner for the purpose of establishing respondent's corporate activities in Florida so as to be subject to process in that state and that Briardy was an agent transacting business for it in Florida.

The respondent moved in the Federal District Court to dismiss or in lieu thereof to quash the return of the United States Marshal's service of summons upon Briardy (R. 105-106), which motion, as amended (R. 106), was granted August 29, 1951 (R. 107).

The relevant facts reflected by the depositions are condensed in the following outline.

The respondent is an Iowa corporation and maintains offices in Des Moines, Iowa (R. 71), and in other cities not

in Florida (R. 72). It has not qualified to do business in Florida, has no bank accounts, officers, directors or offices in Florida (R. 97).

Respondent owned and published three nationally distributed magazines, viz.: Look, Flair and Quick magazines (R. 58).

Orders for Look magazine for example were received from wholesale distributors and were sent to a bindery, an independent contractor, in Chicago, which filled such individual orders by shipping such magazines direct to independent wholesalers by common carriers (R. 95).

The magaines were distributed in Florida to news stand retail dealers by two independent wholesalers (R. 75-77) in the state of Florida. In addition full and part time independent subscription salesmen augmented retail news stand sales in Florida by mailing copies direct to subscribers by respondent (R. 92-93). The collections, less commissions, were remitted directly by mail to the respondent, together with the acceptance of direct mail subscriptions from Florida by respondent in Iowa and the delivery of magazines by mail directly to such subscribers (R. 85).

Circulation was important as a source of revenue and was used as a basis for advertising rate structure (R. 73). Respondent employed a circulation staff of salaried circulation road or district men formerly called assistant circulation managers (R. 79-80). Two of such district men performed services for the respondent in the same capacity in the territories assigned to them in the State of Florida (R. 68). Briardy, one of such two district men operating in Florida on behalf of respondent, was a district man who regularly travelled his assigned territory of Florida, South Carolina, Mississippi, Alabama and Georgia (R. 46,

79). Briardy was the agent of respondent served herein with the federal summons and copy of complaint of the federal district court.

He was hired on a salary basis and allowed in addition certain expenses for travel (R. 48-50). His duties were to check with regular, periodic frequency retail sales-outlets of the two wholesalers (R. 46, 51) in Florida, and arrange with retail outlets for better display of the magazines of respondent (R. 51, 56) and to provide for and arrange poster display advertising in such retail outlets (R. 51) promoting the sales of respondent's magazines and insure that sufficient numbers of copies were provided retail outlets. His duty also was to generally promote the sales and circulation in his territory in Florida, and periodically mail written reports to respondent relating to retail-outlet complaints (R. 51-55) as to delivery or insufficient copies of magazines. He further met with wholesalers (R. 55-56) to check and correct complaints of retailers and urged the wholesaler to use poster advertising material furnished by respondent (R. 56) and correct complaints of retailers (R. 56). His function was to increase circulation of respondent's magazines to the best of his ability (R. 51, 47, 54-55, 58-59). Advertising displays were also sent direct to Florida retailers by respondent's New York office and were included in individual magazine bundles to the independent wholesalers (R. 82).

Briardy's time was fairly well proportioned among the five states of his territory and he spent considerable portion of his time in Florida (R. 68, 69). He tried to follow a regular itinerary (R. 51).

Briardy testified he had no place of residence; he travelled out of a suitcase from town to town; received his mail at a letter drop in Miami, Florida, and all other mail in hotels (R. 43).

In following a regular itinerary in Florida he checked the news dealers in small towns as well as the large cities (R. 51). For example, while in the City of Miami he would generally start out and cover 40 dealers, 40 stores that handle magazines in the course of a day (R. 51). He would even count the magazines to have some idea as to how the sale was progressing. If the display was not satisfactory he would personally adjust the display of respondent's magazines with the cooperation of the retail dealer (R. 51). He also stated he put up poster advertising at such retail stores in Florida (R. 52) and obtained such advertising material and posters from the magazine wholesaler in Miami the American News Company or occasionally had advertising material sent to him direct by the New York office of respondent.

The respondent also used Briardy on occasion to use his discretion on behalf of respondent to promote the introduction and sale of its new magazine Flair to people of Florida during February, 1951, during the Florida winter season (R. 57, 58). Briardy testified he was called away from another state in his territory by respondent while on his scheduled itinerary and stated (R. 58):

> "* * * When we first put Flair on the market, which was in February of this year, the fact that it was the Winter season here, and a class publication like Flair which sells for 50 cents, which in all probability would have a very good sale in this town and surrounding area, they thought it would be best I stay in this area to see how the sale was getting along, and make sure it was being promoted properly."

Briardy then stated he performed for the respondent in Florida the same duties for Flair and Quick magazines of respondent that he performed for its Look magazine (R. 58) using the same methods to promote their circulation in Florida. Briardy also testified he contacted dealers in

many towns and cities in Florida in Miami, Miami Beach, Key West, Ft. Lauderdale, West Palm Beach, Hollywood, Delray, Orlando, Daytona Beach, Jacksonville, St. Augustine, Tallahassee, St. Petersburg, Clearwater, Sarasota, Tampa and several other communities not named (R. 67, 68).

When asked if he covered the City of Pensacola (R. 68) he stated that Pensacola was not in his Florida territory but is covered by a circulation road man of respondent who makes his headquarters at New Orleans and such individual visits that part of Florida in the same capacity as Briardy visited his Florida territory.

Respondent placed advertising in newspapers throughout the country and Mr. Whatmore, a vice-president of respondent, stated he was sure, "subject to check," that advertising had been placed in Florida newspapers in order to promote sales and increase circulation (R. 88). He also stated advertising displays were sent direct to dealers by respondent's New York office and were also included in individual magazine bundles (R. 82).

The magazines were distributed to news stand retail dealers in Florida by the American News Company and by Cooper News Company as independent wholesalers (R. 75-77). Average issue circulation in Florida of Look magazine alone is about 48,000 copies (R. 75).

In addition to news stand sales magazines were mailed to individual subscribers. Fifty per cent of individual subscriptions in Florida were procured through direct mail (R. 85).

Other subscribers in the state purchased subscriptions through agents and the orders were forwarded with cash (R. 85). It was a consistent practice to have subscription

agents in Florida. These agents were, in many cases, large companies operating out of New York or Philadelphia. They employed crews which toured the country and at times got into Florida. Crew members were employees of the subscription agency houses and such agents did not solicit exclusively for respondent but for many other magazine publishers as well (R. 92-93).

There were a small number part-time subscription salesmen or agents actually operating in Florida. These produced no more than 250 out of 10,000 subscriptions obtained annually. Subscriptions were subject to acceptance only by the respondent (R. 93, 99, 100).

Upon these facts the District Court (R. 106-107) ruled respondent was not at the time of the service of the federal summons upon Briardy doing business in the federal district of the Court and the Court did not have jurisdiction under Section 1391, sub-section C, New Title 28, United States Code, and entered a final judgment dismissing the action *in personam*. An appeal was duly taken to the Court of Appeals for the Fifth Circuit and the judgment of the District Court was affirmed in an opinion (R. 109-115) reported in 197 F. 2d (5th) 74. Russell, Circuit Judge, dissenting (R. 114, 115).

This Court granted certiorari herein on October 20, 1952 (R. 116).

## SPECIFICATION OF ERRORS.

The Court of Appeals for the Fifth Circuit erred:

1. In holding that respondent was not doing business in Florida at the time of the service of summons.

2. In holding that the evidence presented no such showing of doing business as would justify the ex-

ercise of jurisdiction herein of the District Court in Florida.

3. In holding that this Court in *International Shoe Company* v. *State of Washington, Office of Unemployment Compensation and Placement,* (1945) 66 S. Ct. 154, 326 U. S. 310, did not change, but merely restated and clarified the old fiction and concept of doing business and overlooked the ruling of this Court in the case last cited that the practical test now followed seeks to determine not whether the acts of the corporate agent within the state are "a little more or a little less," but rather do the contacts as a whole of the corporation within the forum state make it just and reasonable to require a corporation to defend a suit there.

## SUMMARY OF ARGUMENT.

The demands of Constitutional due process as regards a personal action against a foreign corporation have been met by the total contacts and activities of the respondent in the forum State of Florida, as the same make it reasonable to require the respondent to defend the libel suit brought there, and the terms "present" or "presence" or "transacting business" are used merely to symbolize those activities of the corporation's agents within the state which federal courts will deem to be sufficient to satisfy the demands of due process, and that the maintenance of the suit does not offend traditional notions of fair play and justice.

Petitioner contends that respondent's total activities within the state of Florida satisfied the demands of due process in that Briardy as a part of such corporate activities was "transacting business" for respondent as its agent in Florida under the definition of the Florida Statute

and that it would not have been a denial of due process to respondent for the federal district court in Florida to have retained jurisdiction to subject respondent to such suit *in personam*.

Petitioner's libel action arose and was filed within the state of Florida. The corporate activities of respondent were not irregular or casual, but through its two Florida road circulation or district men and other state activities were substantial and performed with regular, periodic frequency and connected in plan in an intensive operation and supervised sales promotion over the entire state of Florida in most of its towns and in all of its cities.

The libel action did not arise from any corporate dealings distinct from its Florida operations as the libelous statements concerning petitioner, a resident of Florida, were broadcast and were primarily affected by the large sale, circulation and distribution in Florida of the May 23, 1950, issue of the national weekly magazine "Look," charging plaintiff with being a member of a criminal gang called the "Mafia."

The Court of Appeals of the Fifth Circuit (R. 159-160) held herein:

> "* * * It is true that the approach of some of the recent opinions to the question under review has seemed less rigid in its requirements for jurisdiction than the earlier approach. We think, though, that they, and the new statute which embodies them, must be regarded, not as changing, but as restating and clarifying, the law. They certainly do not furnish warrant for the view pressed upon us by appellant that, *because of the activities of Briardy here*, the company can be said to be doing business in the state so as to be subject to suit there" (emphasis supplied).

The dissenting opinion (R. 160) of Russell, Circuit Judge, is as follows:

> "The majority opinion sets forth the facts of the case and also the appellant's contentions and citations of the applicable law. I think the authorities relied upon for reversal require that result since, in my opinion, the facts present show that the activities of the defendant (circulation and sale and the promotion thereof) amounted to 'doing business' within the State of Florida; the injury claimed, if existent, is connected with such activities; and the defendant had an agent in Florida upon whom service could properly be effected. Florida Statutes Annotated, Section 47.17 (5)."

It is to be noted at the outset in a comparison of the above quotations Judge Russell in his dissent did not limit or circumscribe the activities of the respondent in the forum state to the sole activities of Briardy as the majority of the Appellate Court did, but rested his conclusion that the company was doing business within the State of Florida because of the whole of the activities of the company "(circulation and sale and promotion thereof)" within the state of Florida.

Petitioner contends the Court of Appeals unduly restricted and narrowed the application of the case of *International Shoe Company* v. *State of Washington*, 66 S. Ct. 154, 326 U. S. 310, in holding that such case and the new federal statute quoted herein do not change but merely restates the old fiction and concept of corporate presence or transacting business, and that the practical test now followed by the Court under such case seeks to determine not whether the acts of a particular corporate agent within the forum state are "a little more or a little less," but rather do the activities as a whole of the corporation within the forum state make it reasonable to require the corporation to defend a suit there.

Petitioner contends the Appellate Court erred in failing to properly apply the International Shoe Company Case and such decision is also in conflict with the cases of the First,[1] Second[2] and Seventh[3] Circuits which have followed and applied the ruling of this Court in a manner that did not merely weigh the acts of the corporate agent served with process to find if the corporation was "present" within the forum state but rather did the activities of the foreign corporation as a whole make it reasonable to require it to defend a suit in the forum state.

## ARGUMENT.

The two questions of law are so closely related that we will treat them together.

The federal summons with a copy of a complaint was served upon respondent by delivering same to Paul T. Briardy in his actual role under the Florida Statute of an "agent transacting business for it in the state," in the absence of a resident business agent, officers, directors, general manager, secretary, cashier, vice-president, president in their inverse order under the Florida Statute 47.17, F. S. A.

It seems unnecessary to go further for support of petitioner's contentions than the leading and ruling case of *International Shoe Company* v. *Washington*, 66 S. Ct. 154, 326 U. S. 310.

There, contributions to the Washington State Unemployment Compensation Fund were assessed against a

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[1]*Schmikler* v. *Petersime Incubator Co.*, 177 F. 2d 983, 990.

[2]*French* v. *Gibbs Corporation*, 189 F. 2d 781.

[3]*Consolidated Cosmetics* v. *D-A Pub. Co., Inc.*, 186 F. 2d 906.

Delaware corporation which took an appeal from a judgment of the State Supreme Court which sustained the assessment.

The Delaware corporation with a principal place of business in Missouri, had no office in Washington and made no contracts either for the sale or purchase of goods there. It had no stock of merchandise in the state, and made there no deliveries of goods in interstate commerce. The company did employ on commission several salesmen resident in the state to whom it supplied lines of samples, consisting of one shoe of a pair, for display to prospective customers. The salesmen on occasion rented permanent and temporary sample rooms and the company reimbursed them for rent so paid.

The salesmen's authority was limited to showing samples and to soliciting and transmitting but not accepting orders. When accepted, orders were shipped f. o. b. to purchasers. No salesman had authority to enter into contracts or to make collections.

Service of process was had upon one of the company's salesmen in the state and notice was also mailed to the company.

The company, clinging to those cases which hold mere solicitation insufficient to render a foreign corporation amenable to suit, contended, *inter alia*, that its activities within the state were not sufficient to manifest its "presence" there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit.

In holding this contention untenable and in sustaining the state court, the Supreme Court, speaking through Mr. Chief Justice Stone said, in part, 326 U. S., pp. 316, 317, *supra*:

"* * * due process requires only that in order to subject a defendant to a judgment *in personam* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' * * * (cases cited). * * *

"Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein* v. *Tax Supers.*, 282 U. S. 19, 24, 75 L. Ed. 140, 143, 51 S. Ct. 15, 13 A. L. R. 679, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which the courts will deem it be sufficient to satisfy the demands of due process. L. Hand, Circuit Judge, in *Hutchinson* v. *Chase & Gilbert*, (C. C. A. 2d) 45 F. 2d 141. Those demands may be met by such contacts of the corporation with the state of the forum as makes it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate' of the 'inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection * * * (cases cited) * * *."

The Court, after discussing continuous and systematic activity of a corporation and the casual presence of the corporate agent and his conduct of single or isolated items of activities within a state, said, 326 U. S., p. 319, *Supra*:

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitive. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. * * *. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. Cf. *Pennoyer* v. *Neff*, 95 U. S. 714 (and other cases cited) * * *.

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue * * * (cases cited) * * *."

As to service upon one of the salesmen in the state, it was said, 326 U. S., p. 320, *supra*: -

"We are likewise unable to conclude that the service of process within the state upon an agent whose activities established appellant's presence there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual."

Commenting upon the International Shoe Company case, the Court of Appeals, Second Circuit, in *French* v. *Gibbs Corporation*, 189 F. 2d 787, decided June 7, 1951, speaking through Circuit Judge Learned Hand said, *inter alia*:

> "Such an approach was *toto coelo* different from that of *Bank of Augusta* v. *Earle, supra*, 13 Pet. 519, 10 L. Ed. 274; it regarded the corporation, not as a fabricated jural person, but as a confederative venture to which, like all concerted activities, one can ascribe location only in places where its purposes are either planned or executed, although it is imminent in all of these. It does not indeed follow that a corporation should be subject to process wherever it is 'present' in that sense; but continuous activities, be they as little as one will, satisfy the necessity of that physical "presence" on which jurisdiction depends in a jurisprudence, territorially limited. Jurisdiction *in personam* in such a jurisprudence presupposes the power of the court to lay its hand upon the defendant, since otherwise it cannot compel his obedience; and it is not a solecism, but an act of grace, if it substitutes notice for a *capias*. For that reason it is also permissible to substitute for a *capias* notice served upon anyone who is conducting the local activities of a corporation outside the state which chartered it; and the only remaining question is whether to force it to trial in the forum of those activities is too unfair to be constitutionally defensible. The 'demands of due process * * * may be met by such contacts of the corporation with the state of the forum as make it reasonable * * * to require the corporation to defend the particular suit."

And further, the Court said:

> "(3) As we have said, courts have indeed often spoken as though a corporation's 'presence' depended upon the existence of those attending circumstances,

which make it just that the trial should be in the forum selected by the plaintiff; but it is not permissible, we believe, to regard this as only a shorthand for saying both that the corporation was engaged in *some* local activities, and that these were important enough to make the local trial fair. Obviously among the facts that will be relevant upon that issue is whether the liability arose out of events occurring within the state of the forum. Still more relevant and important will be whether the service was made within a short time after the corporation had discontinued its principal activities. Certainly when these two circumstances conspire, it is proper to demand of the defendant some showing why during the interval the situation had so changed that, although it was fair to force it to a trial before it reduced its activities, it had become unfair when the writ was served. In the case at bar the defendant showed nothing of the sort; it rests upon the thesis that, as soon as its activities ceased to be independently enough to subject it to service, it ceased to be so subject, until it should once more assume enough activities to make it justiciable. Our answer, as we have said, is that, *given any continued local activities the strict requirement of 'presence' is satisfied;* and that the rest is a matter of more or less" (Emphasis Supplied).

We also invite attention to *Consolidated Cosmetics* v. *D-A Publishing Co., Inc.*, 186 F. 2d 906 (7th Cir., 1951), where the defendant publishing company, a New York corporation, was sued for trademark infringement in a District Court in Illinois.

Service was had upon an official of the Kable Company. The Kable Company printed the defendant's magazines under contract in Mount Morris, Illinois.

The defendant's business activities in Illinois and its relations with Kable are detailed in the following excerpt from the decision in which the judgment of the District

Court, quashing the service of process, was reversed the Court saying:

"We think the facts of the present case are even stronger in support of jurisdiction on the non-resident corporation than they were in the International Shoe case. Here the New York corporation had made Mount Morris, Illinois, its place of publication in order to qualify with the postal department for mailing second class matter. It stored merchandise with its contractor, Kable, in Illinois, including paper and other materials to be used in printing the magazines. It sent to Kable drawings, reading matter, photographs and engravings, and employed Kable and thereby authorized it to set up the copy and to print the magazines in completed form. It contracted with and thereby authorized Kable from time to time, as the magazines were printed, to wrap them, to address them to defendant's consignees and to deposit them in the mail addressed to such consignees. These activities were not casual, isolated or disconnected but continuous and connected in plan and series. If we are to follow the Supreme Court, we cannot avoid the conclusion that such activities necessitated contacts which were such, when these magazines were published and placed in the mail at Mount Morris bearing an allegedly infringing mark, as not to exempt defendant from service of process in Illinois. We think that these activities, their extent and their continuity, their nature and their effect, were such inevitably as to constitute doing business in Illinois and, therefore, to render the defendant subject to suit in that jurisdiction.

"The functions of a magazine publishing company, obviously, include gathering material to be printed, obtaining advertisers and subscribers, printing, selling and delivering the magazines for sale. Each of these, we think, constitutes an essential factor of the magazine publication business. Consequently, if a non-resident corporation sees fit to perform any one of those essential functions in a given

> jurisdiction, it necessarily follows that it is conducting its activities in such a manner as to be subject to jurisdiction. * * *. Such a conclusion we think, is in accord with 'traditional notions of fair play and substantial justice' and is not, therefore, approval of undue process."

In the case at bar the appellee was performing at least some of the functions mentioned above, as well as others in addition, in the State of Florida.

Respondent at times through its paid writers gathered material in Florida (R. 92). It dealt directly by mail with magazine subscribers and prospective subscribers who reside in the state (R. 85). Agents operating in the state solicited subscriptions from people in Florida and collected subscription charges there (R. 85), (R. 92-93), (R. 99-100). It must necessarily have delivered its magazines to individual subscribers within the state. In addition, it employed two agents to deal directly and intensively with magazine retail vendors in Florida for the purpose of advancing, promoting and encouraging the sale of Look Magazine; to receive complaints from retailers and communicate these complaints to the appellee; to check and possibly rearrange vendor's displays of appellee's magazines; to furnish and set up advertising displays at retail outlets and generally to see that the appellee's interests in Florida, insofar as the sale of its magazines is concerned, were being well served in order to get the most efficient sale possible and to increase circulation (R. 47, 55, 80).

Was the quality and nature of the activity of the respondent's agents in Florida such as to satisfy due process requirements by subjecting respondent to an action *in personam* in that state after service of process upon an agent employed in the state by it for the purpose of seeing that respondent's interests there were being protected and well served?

We submit that it was. The main purpose of and reason for the activities of respondent's agents operating in Florida, and especially as regards Briardy, was to induce and encourage more and more people in Florida to purchase and read Look Magazine, the very vehicle carrying the alleged defamatory material of which petitioner complains.

The rationale that undertakes an estimate of the inconveniences and applies as a test whether or not the corporate activity has established sufficient contacts or ties within the forum state to make it just and reasonable from a standpoint of fair play to make the foreign corporation amenable to process is well demonstrated in the libel action herein.

While exercising the privilege of conducting its activities within the state respondent enjoyed the benefits and protection of Florida laws.

Suppose, for example, that respondent had sought by force to prevent Briardy from arranging displays of that issue of Look Magazine which carried the allegedly false and libelous matter designed to injure petitioner's reputation. Or suppose respondent had attempted to disturb such displays so that people in his community would not have been attracted to purchase and read that issue. He would have been prohibited from so doing by the laws of the state of which he is a citizen.

Certainly then, the "traditional notions of fair play and substantial justice" will not be offended if respondent is called upon to account for its allegedly unwarranted defamation of the petitioner's character in the place where that character and reputation is injured by acts of respondent, assisted and abetted by its agents in Florida.

Assuming, for the sake of argument, that respondent may, at least to some extent, be inconvenienced by being required to defend this suit in Florida rather than in Iowa or possibly New York. Is the estimate of this inconvenience such that the requirement to defend in Florida will offend "traditional notions of fair play and substantial justice"?

An answer in the negative is clearly indicated by the activity of respondent. It must have known, when it published matter defamatory to the character and reputation of the appellant and caused the vehicle for this alleged libel to be circulated and published in petitioner's home state and city, that he would suffer damage there as the result of such publication and distribution.

When respondent set out deliberately to injure the appellant in his home it should have been ready to defend its actions there.

If respondent is required to suffer any inconvenience as a result of having to defend this suit in Florida it is an inconvenience which it might well have anticipated.

To require petitioner to bring this suit miles away from his home where he has been damaged in some jurisdiction where he is unknown; some place of the appellee's choosing, would indeed offend our "traditional notions of fair play and substantial justice."

As was said in *Clements* v. *Macfadden Publication, Inc.*, 28 Fed. Supp. 274:

> "To carry the present line in holdings to any greater extent than they now exist could easily result in a publication two thousand miles away destroying a man's reputation, whether he be great or small, and requiring him to come to unfriendly territory, perhaps, to effect his vindication in the courts of justice.

For this reason and for others it is manifest that the shipment and circulation of printed documents should hardly be grouped and classed with ordinary articles of merchandise."

While we have stated that we consider it unnecessary to go further back for authorities supporting our contention than the case of *International Shoe Company* v. *Washington, supra,* especially in view of the confused state of the law on the question here involved which existed prior to that decision, as outlined by Judge Hand in *French* v. *Gibbs Corporation, supra,* we should like to invite the attention of the Court to the case *International Harvester Co.* v. *Kentucky,* 234 U. S. 579, 58 L. Ed. 1479, and to the opinion of the Court delivered by Mr. Justice Rutledge in *Leo French* v. *Louisville Cement Co.,* 134 F. 2d 511, both of which support the contention which we make here.

The Supreme Court of Florida has construed the statute governing service of process in the state in *George A. Hormel & Co.* v. *Ackman,* 158 So. 171.

In that case the plaintiff in error, a foreign corporation, was served by delivery of summons to a salesman residing in Florida. The salesman was employed to solicit orders only, subject to acceptance by the company. In some, but not all, instances he collected for orders taken and transmitted the collections to the company. Deliveries of orders were shipped from outside the state.

The Court held that the salesman was the plaintiff in error's "business agent, resident in the State of Florida." This classification is a higher order than "any agent transacting business for it in the State" as such agent is not required to be a permanent resident of the State.

Justice Ellis (concurring specially), 158 So. 173, *supra,* stated:

"By that course of business the corporation manifested its presence within the state and Waseman's authority * * *. In which circumstances he was a business agent of the corporation resident in this state * * *"

However it is not necessary for us to show Briardy was of the next high order of "business agent, resident in the state" as the facts show conclusively respondent manifested its presence within the state by an "agent transacting business for it in the State," within the Florida Statute.

It may be that Briardy was not resident in the State of Florida although, since he had no residence anywhere, it would seem that he was a resident in the State of Florida while he was actually present in that state. In any event, if he was not a resident his activities were such as to constitute him an "agent transacting business" for the appellee in Florida.

The activities of Briardy were intensive, on a regular, planned itinerary that carried him into almost every part of Florida. His counterpart in and about Pensacola and surrounding territory performed in a like capacity. In the cities Briardy visited about forty dealers or stores a day performing a multitude of duties with dealers, wholesalers, the New York office and advertising material that kept him very busy not merely checking but using his discretion in arranging displays, curing complaints, promoting sales of three national magazines of respondent and turning in many written reports to respondent's office in New York.

He was highly regarded by respondent as a responsible corporate agent to the extent (R. 58) he was ordered into the State of Florida while on his scheduled district itin-

erary and to see on behalf of respondent that the sale of a new publication of respondent's called Flair was being promoted properly in the Florida territory during the winter season of 1951.

In the words of Mr. Justice Day in *International Harvester Co. v. Kentucky*, 234 U. S. 579, 589:

> "We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character."

## CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

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IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1952.**

**No. 287**

AL POLIZZI,
*Petitioner,*

v.

COWLES MAGAZINES, INC.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

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**No.**

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## BRIEF FOR RESPONDENT IN OPPOSITION.

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### Opinions Below.

No formal opinion was filed in the District Court, but the ground for dismissing the action is stated in the order of the District Court as follows (R. 143):

> "* * * the Court * * * finds as a matter of fact that defendant was not, at the time of the service of the summons, doing business in this district and that, therefore, this Court does not have jurisdiction under Section 1391, sub-section C, New Title 28, United States Code."

The opinions in the Court of Appeals for the Fifth Circuit are reported at 197 F. (2d) 74.

## Jurisdiction.

The basis of jurisdiction is correctly set forth in the petition.

## Questions Presented.

1. Whether respondent, publisher of leading magazines of national circulation, with no office, place of business, property, listing or activities in the State of Florida, and which has not qualified to do business or consented to accept service in said state, is transacting business in said state solely by reason of periodic visits paid to said state by two minor employees of respondent whose sole duties are to check the display and position of respondent's magazines at newsstands and other retail outlets, to report complaints of such retailers to respondent's New York office, and occasionally to put up a few advertising posters.

2. Whether a minor employee of respondent whose sole duties are to check the display and position of respondent's magazines at newsstands and other retail outlets, to report complaints of such retailers to respondent's New York office, and occasionally to put up a few advertising posters, is an agent transacting business for the respondent in the State of Florida, within the meaning of Section 47.17 of the Florida Statutes Annotated.

## Statutes Involved.

Section 47.17, Florida Statutes Annotated, provides that process against any corporation, domestic or foreign, may be served upon certain designated officers and agents, or a director, of the corporation. It further provides:

> "If a foreign corporation shall have none of the foregoing officers or agents in this state, service may be made upon any agent transacting business for it in this state."

## Statement.

Petitioner, a resident of Florida (R. 6), commenced this action against respondent in a Circuit Court of Florida, alleging that the May 23, 1950 issue of respondent's magazine LOOK contained an article which constituted a libel upon the petitioner (R. 6-18). Upon respondent's petition, the action was removed to the United States District Court for the Southern District of Florida, Miami Division (R. 1-4). Respondent further moved to dismiss the action or to quash the return of service on one Paul T. Briardy, as an agent of respondent, upon the following grounds (R. 141):

> 1. That the respondent was not subject to service of process within the State of Florida, inasmuch as it was organized under the laws of Iowa, was not transacting business in Florida, and had not appointed an agent for service of process in Florida; and

2. That Briardy was not an officer, a manager or general agent, or an agent authorized by appointment or by law to receive service of process for respondent.

The motion to dismiss having been granted in the District Court, judgment was entered thereon and petitioner appealed (R. 143-145). The Court of Appeals for the Fifth Circuit affirmed, Judge Russell dissenting (R. 160). Both the District Court and the Court of Appeals based their decisions on the resolution of the questions of fact presented.

The pertinent facts may be summarized as follows:

Respondent, publisher of LOOK, QUICK and FLAIR magazines, is an Iowa corporation, with its principal corporate office in Des Moines, Iowa, and other offices located in New York City, Chicago, Boston, Cleveland, Detroit, Philadelphia, Los Angeles and San Francisco (R. 96-97). It has never qualified to do business in Florida and has never conducted any business in that state (R. 24, 131-132). It has never had any office, listing, bank account, securities, safe deposit box or other personal property, or any real estate, in Florida, nor has it ever had any books or records in Florida (R. 24, 131). None of its officers or directors resides in Florida nor does any officer, director or employee (except the two circulation road men to whom we will later advert), perform any services for the Company in Florida (R. 131, 91). Particularly and specifically, respondent has no salesman or other employee in Florida soliciting advertising or sales of its magazines (R. 127).

The material for LOOK Magazine is selected, edited and put in final form for printing in New York City;

the magazine is printed and bound by an independent company in Chicago (R. 129). LOOK Magazine is purchased by the public in two ways: first, in single copies, from newsstands and other retail outlets; second, by subscription. Subscriptions are sold (a) by respondent through direct mail orders (R. 114), (b) by independent companies (loosely referred to as "subscription agents"—although they are in no sense agents of respondent) which send soliciting crews into various states, taking orders for many different magazines (R. 40, 125-126), and by individuals who solicit subscriptions on their own (R. 126), and (c) by retail outlets, *i. e.*, independent retailers, such as newsstands, which transmit subscriptions to respondent directly or through the wholesalers (R. 40). Subscriptions are subject to rejection by respondent (R. 126), and are serviced from respondent's Des Moines office (R. 132). All subscription copies are mailed direct to subscribers from the bindery in Chicago (R. 133).

Single copy sales are handled by independent retailers, which purchase their copies from wholesalers. Respondent sells copies of LOOK to about 300 wholesalers throughout the country (R. 116), the largest of which is The American News Company, which has branches throughout the United States and which handles a total of approximately 400 magazines (R. 117, 41-42). The relationship between respondent and the wholesalers is that of "vendor and vendee" (R. 102, 42). The copies of LOOK Magazine are shipped from the bindery in Chicago to the wholesalers by common carrier (R. 129-130), and respondent bills the wholesalers for the copies shipped (R. 24, 132). In turn, the wholesalers sell to the retailers (R. 39). Respondent deals *only* with the wholesalers—

it does not even have a record of the names and places of business of the retail outlets which sell its magazines to the public (R. 110).

Respondent's only representatives in Florida are two circulation road men. Neither of them resides in Florida and neither of them is regularly stationed in that state; their sole duties are to check the display and position of respondent's magazines at newsstands and other retail outlets, to report any complaints of retailers to respondent's New York office, and occasionally to put up a few advertising posters (R. 60, 63-64, 70). *The road men do not solicit subscriptions or advertising* (R. 71, 80, 86, 87, 111).

Paul T. Briardy (to whom the summons and complaint in this action were delivered by the marshal), covers the entire State of Florida with the exception of Pensacola (which is covered by the other road man), in addition to Alabama, Georgia, Mississippi and South Carolina (R. 83, 91, 110). His authority and activities are limited as set forth in the preceding paragraph. He has no desk or office space in Florida, but prepares his reports at his hotel room, wherever he may be (R. 71-72). He has nothing to do with the physical handling or distribution of respondent's magazines (R. 85, 108); he has no authority to employ anyone for respondent, to buy or sell anything for it, or to make any contracts or commitments for it (R. 74-75, 84, 110). He has no part in selecting the wholesalers, no authority to give directions to any wholesaler and no authority to cut off any wholesaler or to cancel any shipments to it (R. 64, 66, 84, 85). For his services Briardy receives a salary of $75 per week (not $105 per week as petitioner states—Pet. 10), plus $30 per week to reimburse him for the gas,

oil and upkeep of the automobile in which he travels through the five States which constitute his territory (R. 67-69). This automobile belongs to Briardy; he purchased it, pays his own insurance, pays for its upkeep and uses it for his own personal pleasure as well as Company business (R. 67-68). He receives no commission or other additional compensation (R. 85, 121).

## ARGUMENT.

### I.

The opinions of the Court below show clearly that the District Court decided *as a question of fact* that respondent was not transacting business in the State of Florida, and that this finding of fact was affirmed by the Court of Appeals. Although petitioner makes an earnest effort to convince this Court that the decisions below are in direct conflict with the opinion of this Court in *International Shoe Co.* v. *State of Washington*, 326 U. S. 310, an analysis of the *International Shoe Co.* case shows the fallacy of this argument.

In that case, the reasoning of this Court followed the line of decision of the Supreme Court of Washington, explained by Mr. Justice Stone as follows (326 U. S. at p. 314):

> "The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was

> also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there."

This is the so-called "solicitation plus" rule. In the case now under consideration, there has been no "regular and systematic solicitation of orders in the state by (respondent's) salesmen, resulting in a continuous flow of (respondent's) product into the state * * *" In fact, there has been no solicitation of business whatever by any representative of respondent—either of sales of the magazines or of advertising contracts. It cannot be said, therefore, that the judgments of the courts below are in conflict with the decision of this Court in the *International Shoe Co.* case, for the facts in the instant case are wholly different, not merely in detail or quantitatively, but in their very nature. None of the activities of the appellant in the *International Shoe Co.* case finds a parallel in the work of respondent's road men in this case, nor does any activity of the latter bear comparison with the activities of the Shoe Company salesmen.

On the contrary, the judgments in the courts below are wholly consistent with the principle enunciated in the *International Shoe Co.* case. If we correctly understand this principle, it is to the effect that where a corporation engages in *substantial* activities in a state, to such an extent (taking into consideration

the quality and nature of these activities), that it can be said that it is "present" in the state, it may be made subject to service of process in that state. Bearing in mind that no substantial element of any of respondent's basic activities, viz., the editorial creation and physical production of its magazines, the sale of its magazines and the sale of advertising space in its magazines, is carried on by respondent in Florida, the conclusion is inevitable that the courts below in holding that respondent was not transacting business in the State of Florida fairly followed the principles laid down in the *International Shoe Co.* case.

## II.

Basically, petitioner misconstrues the holding in *International Shoe Co.* v. *Washington.* In that case it was the corporation which had been held amenable to service of process which appealed to this Court on the ground that the ruling below constituted a violation of the due process clause of the Constitution. In the case now before the Court no question of due process is involved. All that has happened is that a Federal Court, construing a state statute, has held that under the statute the respondent has not so conducted itself as to render itself amenable to the service of process within the state.

The *International Shoe Co.* case marked the limitations of a state's authority to subject a foreign corporation to service of process; it by no means held that a state was required to subject a foreign corporation to service of process if the minimum activities of

the corporation described in the *International Shoe Co.* case were present.

It is the latter rule which the petitioner now seeks to induce this Court to propound, for the instant case arose in the State court and the question of jurisdiction must be decided under Florida law—in particular, Section 47.17, Florida Statutes Annotated, *supra*.

Clearly, this is neither a question of "due process" nor, indeed, a Federal question of any nature. As the Court said in *Pulson* v. *American Rolling Mill Co.*, 170 F. (2d) 193, 194:

> "There are two parts to the question whether a foreign corporation can be held subject to suit within a state. The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it so chooses is a matter for the law of the state as made by its legislature. If the state has purported to exercise jurisdiction over the foreign corporation, then the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution. Const. art. 1, sec. 8, cl. 3; Amend. 14. This is a federal question and, of course, the state authorities are not controlling. But it is a question which is not reached for decision until it is found that the State statute is broad enough to assert

jurisdiction over the defendant in a particular situation."

To the same effect, see,

*Perkins* v. *Benguet Consol. Min. Co.*, 342 U. S. 437.

## III.

Petitioner further contends that the judgments herein are in conflict with the following cases in the First, Second and Seventh Circuits, viz., *Schmikler* v. *Petersime Incubator Co.*, 177 F. (2d) 983; *French* v. *Gibbs Corporation*, 189 F. (2d) 787, and *Consolidated Cosmetics Co.* v. *D-A Pub. Co., Inc.*, 186 F. (2d) 906. We find no such conflict.

The *Schmikler* case involved the application of the "solicitation plus" rule. In *French* v. *Gibbs*, the defendant corporation concededly had been doing business in the State of New York until a month prior to the service of process upon it. It had not wholly withdrawn from the State, and the claim in suit was an action for breach of a contract that had been made, performed, and breached in the State of New York. Under these circumstances, the Court held that the defendant was subject to suit in New York. In *Consolidated Cosmetics* v. *D-A Pub. Co.*, the defendant, a New York corporation, published a magazine entitled "Taboo", which the plaintiff alleged infringed its registered trademarks "Tabu" and "Tabgo". Service was effected in Illinois. Defendant's magazines were printed, addressed and deposited in the mail in Illinois, and defendant owned other prop-

erty in that state. Furthermore, in its application for second-class mailing privileges, it had designated Mt. Morris, Illinois, as a place of business.

None of these cases involved a factual situation which even remotely resembles the facts in the instant case. Under the *International Shoe Co.* case, *supra*, the determination of amenability to jurisdiction depends on the facts involved. Petitioner is, therefore, wholly unwarranted in urging that there is a conflict in decision between the judgment of the Court of Appeals in this case, and the cited decisions in the First, Second and Seventh Circuits.

## IV.

This case involves no constitutional issue and no Federal question. It involves no principle of importance to anyone except the parties litigant. It involves no conflict of decision between the Circuits. What it does represent is a stubborn determination on the part of the petitioner to try his case in a jurisdiction of his own choosing, irrespective of the fact that the respondent is not "present" in the State of Florida.

But the respondent is "present" in Iowa, New York, Illinois and California. Surely this should give petitioner ample choice of venue. It is difficult to understand why "traditional notions of fair play and substantial justice" will be offended if petitioner is asked to prosecute his action in one of the four States mentioned, while these "traditional notions" would not

be offended if respondent were compelled to bring its witnesses to Florida from Chicago, Cleveland and New York, in order to establish a defense of truth.

## CONCLUSION.

**For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.**

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952

No. 287

AL POLIZZI,
*Petitioner,*

*v.*

COWLES MAGAZINES, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR THE RESPONDENT

### Opinions Below

No formal opinion was filed in the District Court, but the ground for dismissing the action is stated in the order of the District Court as follows (R. 106-107*):

> "* * * the Court * * * finds as a matter of fact that defendant was not, at the time of the service of the summons, doing business in this district and that, therefore, this Court does not have jurisdiction under Section 1391, sub-section C, New Title 28, United States Code."

The opinions in the Court of Appeals for the Fifth Circuit (R. 109-115) are reported at 197 F. 2d 74.

*References are to pages of Transcript of Record.

## Jurisdiction

The decision of the Court of Appeals was rendered on May 23, 1952 (R. 109-115). The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit was filed on August 20, 1952, and granted on October 20, 1952. The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1).

## Proceedings in Courts Below

Petitioner, a resident of Florida (R. 4), brought this action in the Circuit Court for Dade County, Florida against respondent, an Iowa publishing corporation (R. 4, 71-72), for libel based upon an article which appeared in the May 23, 1950, issue of respondent's magazine, Look (R. 4-14). Copies of the summons and complaint were served upon Raymond J. Jennings, both (1) as agent of the respondent herein and (2) as agent of The American News Company, Inc., as agent of respondent (R. 14-15). Respondent first moved in the Florida state court to dismiss the action or, alternatively, to quash the returns of service* (R. 15-16).

The action, which on its merits involves no federal question, was then removed to the United States District Court for the Southern District of Florida, Miami Division, solely because of diversity in citizenship of the parties. Petitioner procured the issuance by the District Court of an additional summons and the service thereof upon Paul T. Briardy as "managing agent" of respondent (R. 40-42). Respondent thereupon moved to dismiss the action or to

*On petitioner's own motion, later made in the District Court, these returns of service were quashed (R. 14-15).

quash the return of service on Briardy, as "agent" of the foreign corporation, upon the following grounds (R. 105-106):

> 1. That the corporation was not subject to service of process within the State of Florida, inasmuch as it was organized under the laws of Iowa, was not transacting business in Florida, and had not appointed an agent for service of process in Florida; and
>
> 2. That Briardy was not an officer, a managing or general agent, or an agent authorized by appointment or by law to receive service of process for the corporation.

The motion to dismiss having been granted in the District Court, judgment was entered thereon (R. 106-107). On appeal, the Court of Appeals for the Fifth Circuit affirmed (R. 109-115), Judge Russell dissenting (R. 114-115). A petition for certiorari was granted by this Court on October 20, 1952.

## Statutes Involved

When the cause was removed to the United States District Court, an additional summons was issued by that Court to Paul T. Briardy. The pertinent section of the Federal Rules of Civil Procedure (28 U. S. C., Rule 4(d)(7)) provides that:

> "* * * it is also sufficient if the summons and complaint are served * * * in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon

any such defendant in an action brought in the courts of general jurisdiction of that state."

Section 47.17, Florida Statutes Annotated, provides that process against any corporation, domestic or foreign, may be served upon certain designated officers and agents or a director of the corporation. It further provides:

"If a foreign corporation shall have none of the foregoing officers or agents in this state, service may be made upon any agent transacting business for it in this state."

**Counter Statement of Questions Presented**

1. Does the decision of this Court in *International Shoe Company* v. *Washington*, 326 U. S. 310, have the effect in diversity jurisdiction cases of over-riding the test of "doing business" recognized by the local law of the forum and of substituting therefor some new, all-controlling federal test of "doing business"?

2. Where there is no basis under the statutory or case law of the state of the forum for subjecting a foreign corporation to *in personam* jurisdiction upon the undisputed facts present in a given case, must the federal court in a diversity jurisdiction case, nevertheless assert *in personam* jurisdiction over such foreign corporation simply because the state of the forum might have, consistent with federal constitutional requirements, provided for, and asserted, such jurisdiction had it chosen to do so?

3. Is the holding of the Court of Appeals declining *in personam* jurisdicton over this respondent foreign cor-

poration, to adjudicate a transitory action not arising in the state of the forum, where respondent has no continuous corporate activity in that state through any office, property, agent or employee regularly located there, so clearly erroneous as to require a reversal by this Court?

## Restatement of the Facts.

All facts relevant to the determination of the issues of jurisdiction and validity of service of process are sufficiently developed in depositions taken by petitioner of (1) M. C. Whatmore, vice president, business manager and one of the directors of respondent; (2) Paul T. Briardy, an employee of the respondent, whose travels into Florida are relied upon by petitioner as amounting to the transaction of business by respondent there; and (3) Raymond J. Jennings, Miami, Florida, Branch Manager of The American News Company. The Court of Appeals held that the facts were "undisputed" but "more fully elaborated" (R. 110) in respondent's brief to that Court. We restate below these undisputed facts in full.

### A. Respondent's Business

The respondent is an Iowa corporation with its principal offices in Des Moines, Iowa and New York City, New York (R. 71-73). It is the publisher of LOOK Magazine, a bi-weekly periodical distributed throughout the United States (R. 17, 19, 90) and two other magazines, QUICK and FLAIR.

The respondent has never qualified to do business in the State of Florida and has never conducted any business

in that State (R. 18, 97). It has never had any office, telephone or other directory listing, bank account, securities, real estate, or personal property (tangible or intangible) in Florida (R. 18, 64, 72, 97). It has never had a safe deposit box nor any books or records in Florida (R. 64-65, 97). None of its officers or directors work in Florida, nor do any of its employees, except Paul T. Briardy (upon whom the purported service was made) and one other circulation roadman who occasionally visits Pensacola (R. 32, 64, 68, 94, 97). These two minor employees come into Florida only from time to time and for the very narrow and limited purposes described later in this brief (*infra* pp. 11-13). Respondent has no salesmen or other employees soliciting advertising in, or sales of, its magazines in Florida (R. 93-95).

The sole business of the respondent is the publication of magazines. This involves basically three operations: first, the physical production of the magazines; second, their distribution and sale; and third, the sale of advertising space in the magazines. For these purposes, the respondent maintains, in addition to its main corporate office, certain branch offices charged with the preparation of editorial matter, the handling of the distribution of the magazines, and the solicitation of advertising. None of the respondent's offices, however, is in the State of Florida (R. 18, 64, 72).

**B. Its Offices**

Respondent maintains its principal corporate office in Des Moines, Iowa, where the annual meetings of its stockholders and directors are held and where its subscription department is located (R. 71-72, 98). The principal busi-

ness, editorial and advertising offices are maintained in New York City; editorial offices are likewise maintained in Los Angeles and Chicago, and offices for the solicitation of advertising are located in Boston, Cleveland, Detroit, Philadelphia, Los Angeles, San Francisco and Chicago (R. 72).

### C. Its Product, LOOK Magazine

Since the cause of action, if any, set forth in petitioner's complaint has to do solely with Look Magazine and the depositions taken by petitioner were accordingly limited almost entirely to that magazine, respondent will not burden this Court in this brief with any discussion concerning respondent's other two publications. If such matter were relevant, the facts contained in the affidavits and depositions in the record show that no activities whatever having to do with the preparation, production or sale of, or the solicitation of advertising in, any of the respondent's three magazines, including its principal product Look, occurred in Florida.

#### 1. Preparation and manufacture of LOOK

The material for each issue of Look Magazine is selected, edited and put in final form for printing in New York City; the magazine is printed and bound by an independent company in Chicago, Illinois (R. 95-96). No step in the writing or production of the magazine takes place in Florida (R. 18, 72, 95-96), although, of course, from time to time photographers and writers have been sent to Florida on specific story assignments, just as they have been sent elsewhere in the United States on like errands (R. 91-92).

**2. Sale of LOOK**

LOOK Magazine is purchased by the public in two ways: first, from newsstands and other retail outlets; second, by subscriptions for a given term—usually a year.

(a) *Subscriptions* are sold in three ways. First, they are sold by the respondent from its Des Moines office through direct mail solicitation (R. 85). Second, they are sold by independent companies or individuals—loosely referred to as "subscription agents"—although they are in no sense agents or employees of the respondent (R. 92-94). These companies send soliciting crews into various states, taking orders for a large number of different magazines (R. 28, 93). The individuals are "independent contractors" who solicit subscriptions on their own (R. 93). Third, subscriptions are sold by retail outlets, *i.e.*, independent retailers such as newsstands, book stores and the like, which transmit them to respondent directly or through their wholesaler (R. 27-28). All subscriptions are subject to rejection by the respondent at, and are serviced from, its Des Moines, Iowa, office (R. 93-94, 98). All subscription copies are mailed from the bindery in Chicago, Illinois (R. 98).

(b) *Single copy sales* are handled by many thousands of retail outlets which purchase their copies from wholesalers. The respondent sells copies of LOOK to about 300 wholesalers throughout the country (R. 77-78, 86-87), the largest of which is The American News Company, with branches throughout the United States which handle a total of approximately 400 magazines (R. 29, 87). The relationship between respondent and

the wholesalers is that of "vendor and vendee" (R. 27, 30, 75-76). The respondent receives from each wholesaler an order blank or sheet for each issue of the magazine. In the case of The American News Company, the order blank is submitted by that company's home office in New York City for all its branches wherever located (R. 95); a copy of the order blank for the issue of Look Magazine involved in this action appears in the record (R. 102A-104). The respondent's traffic department in New York then prepares order slips from the order sheets and sends these to the American Colortype Corporation at Chicago, Illinois, which does the entire binding and shipping operation of Look, under contract, and has no corporate relationship with respondent by stock ownership, interlocking directorates, officers or otherwise (R. 95-96). The bindery fills each individual order from the order slips and when the bundles are ready for shipment, they are loaded on trucks, freight cars and other common carriers for shipment to their destinations (R. 95-96). In the case of The American News Company, the bundles are addressed to the individual branches; in the case of the other wholesalers, they are addressed to the particular wholesaler (R. 96). Once magazines are bundled and delivered by the bindery to the common carrier for shipment, the respondent has no physical control whatever over their distribution (R. 97). The respondent bills the wholesalers for the copies shipped, and in the case of The American News Company where the shipments are made to the branch offices, the News Company's main office in New York City receives a lump-sum bill (R. 98). The respondent has no transactions whatever with the individual

branches of the News Company, a wholly independent corporation with no connection or affiliation whatsoever with the respondent (R. 17-20, 97-98). Respondent has no power to direct the operation of any wholesaler with respect to the sale of LOOK Magazine, and has nothing to do with the magazine's distribution or sale, except as stated above (R. 98, 100). Moreover, the respondent deals only with the wholesaler—it does not even have a record of the names and places of business of the retail outlets which sell its magazines (R. 82, 99).

The only wholesalers who purchase magazines from respondent for resale in Florida are The American News Company and Cooper News Company; its relationship and method of operation with both are similar, and it may terminate its business dealings with them at any time (R. 88, 100).

Thus, no part of the respondent's production, distribution or sale of LOOK Magazine takes place in Florida (R. 98).

**3. Sale of advertising in LOOK**

Respondent solicits advertising from independent advertising agencies representing the advertiser-companies; it does not solicit advertising from the advertiser-companies (R. 83-84). It employs a large staff of advertising salesmen, whose job it is to call on these agencies to "sell" them on placing advertising in the respondent's publications (R. 84). Advertising involving Florida companies is solicited from, and purchased by, their advertising agencies in New York and Chicago (R. 83). To carry on this solicitation, the respondent maintains its advertising offices, to

which we have already referred—but it neither maintains an advertising office in Florida nor employs any salesmen to solicit advertising in that State (R. 72, 94-95).

### D. Respondent's Sole Contact with Florida

Respondent does not solicit the sale of anything in Florida nor does it sell anything there (R. 63-64, 92-95). It has no office, place of business, or permanent location nor even telephone, office, or building listing there (R. 18, 64, 97). No representative of the respondent is maintained in Florida for any purpose whatsoever (R. 32, 43, 64). Its only contacts are by two travelling circulation roadmen who on occasion come into parts of Florida as included within their broader territories (R. 68-69, 80).

The respondent's only employees having any contact with Florida are these two "circulation roadmen" (R. 62, 68-69, 80). Neither of them reside in, or is or has been regularly stationed or located in, that State; their sole duties are to check the display and position of respondent's magazines at the retail outlets, to note any complaints of retailers and to report them to respondent's New York City office, and occasionally to put up a few advertising posters (R. 31-32, 43-44, 46, 51-52, 80). *They do not solicit subscriptions or advertising* (R. 52, 59, 65).

Paul T. Briardy (to whom the summons and complaint in this action was delivered by the marshal) includes in his territory all of Florida, with the exception of Pensacola which is on the route of the other circulation roadman. Briardy as a circulation roadman covers Alabama, Georgia, Mississippi and South Carolina along with Florida (R. 62, 68-69, 80, 82), and his authority and activities are strictly limited to the simple duties of checking or surveying retail

outlets in this five-state territory. As he phrased it (R. 43): "I travel out of my suitcase, from town to town. I have no place except a letter drop in Miami, and all other mail in hotels." He has nothing to do with the physical handling or distribution of respondent's magazines (R. 63, 80). He has no authority to employ anyone for respondent, to buy or sell anything for it, or to make any contracts or commitments for it (R. 62-63, 81-82). He has nothing to do with selecting the wholesalers, no authority to cut off any wholesaler or to cancel any of its shipments if the wholesaler fails to comply with his suggestions (R. 33-34, 62-64, 66). The limit of his authority is to report to respondent's office in New York. He has no desk or office space either in Florida or elsewhere, nor any listing under respondent's name in any telephone or other directory (R. 53, 64); the mail which he receives from the respondent is forwarded to him in accordance with an itinerary which he furnishes respondent (R. 65, 90). He prepares his reports in his hotel room (R. 53). He is not an officer or director of respondent; he has never received any instructions from respondent as to what he should do if any attempt were made to serve legal process on him for the respondent (R. 65-66).

Briardy receives a salary of $75 per week plus $30 per week to reimburse him for the gas, oil and upkeep of the automobile in which he travels (R. 49-50). This automobile belongs to Briardy; he purchased it, carries his own insurance, pays for the gas, oil, repairs, new tires, etc., and uses it for his own personal pleasure as well as for company business (R. 49-50). He receives no commission or other additional compensation (R. 63, 90).

As Briardy divides his time approximately equally among the five states through which he travels, the time

which he spends in Florida is comparatively insubstantial (R. 62, 68-69).

## Summary of Argument

1. A federal court in a diversity jurisdiction case in determining the issue of "doing business" is in exactly the same position as the state court of the forum and is bound to apply the local law of the forum.

2. Neither the federal due process clause, nor this Court's clarification in *International Shoe Company* v. *Washington, supra,* of the permissive limits of due process, requires a federal court in a diversity jurisdiction case to assert *in personam* jurisdiction over a foreign corporation in the circumstances here presented.

3. No error was committed by the District Court or the Court of Appeals in refusing to assert *in personam* jurisdiction over respondent in the instant case. Under the local law of the forum there is no basis either in the Florida statutes or the decisions of the highest court of Florida for asserting such jurisdiction over the respondent.

4. The holding of the courts below is not in conflict either with the decisions of this Court or the decisions of other Courts of Appeal in the First, Second, and Seventh Circuits.

## ARGUMENT

### I

### THE TEST OF "DOING BUSINESS" IN A DIVERSITY JURISDICTION CASE IS DETERMINED BY THE LOCAL LAW OF THE FORUM.

Jurisdiction of the federal court in the instant case is invoked solely on the basis of diversity of citizenship of the parties. The question as to whether this foreign corporation respondent may be forced to litigate in the courts in Florida must, therefore, under the rule established by this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, be determined by the law of the forum, *i.e.*, Florida. As this Court pointed out in *Guaranty Trust Company of New York* v. *York*, 326 U. S. 99 at p. 109, in explaining the effect of the *Erie* v. *Tompkins* decision:

> "In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same * * * as it would be if tried in a State court."

In *Woods* v. *Interstate Realty Co.*, 337 U. S. 535 at p. 538, this Court said that "for purposes of diversity jurisdiction a federal court is, in effect, only another court of the state."

A situation directly in point was presented in *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193 (1948). There, the Court of Appeals for the First Circuit, in holding that the test of doing business was to be determined by the law of the forum, said (p. 194):

> "This case is brought solely on diversity grounds in a federal court sitting in Massachusetts. Rule 4(d)(7) of the Federal Rules of Civil Procedure, 28 U. S. C. A., provides that service of process on a foreign corporation is valid if made in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made. There being no federal statute applicable, and service having been attempted under Massachusetts procedure, the case is governed by the requirements for valid service in that state."

A recent application of this doctrine by the Court of Appeals for the Seventh Circuit is found in *Canvas Fabricators* v. *William E. Hooper & Sons Co.*, 199 F. 2d 485 (1952), where that Court said (p. 486):

> "The primary contested issue is whether defendant was 'doing business' in the State of Illinois so as to be amenable to local process. A procedural question raised by the plaintiff will be subsequently referred to. *This being a diversity case, it can hardly be doubted but that the main question for decision is controlled by local law. Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524; *Pulson* v. *American Rolling Mill Co.*, 1 Cir., 170 F. 2d 193; *Kelley* v. *Delaware L. & W. R. Co.*, 1 Cir., 170 F. 2d 195." (Emphasis supplied)

The sole issue for this Court to determine is whether, on the undisputed facts in the instant case, the two federal courts below correctly construed and applied the Florida law with respect to the amenability of foreign corporations to suit in that State. Those courts were required to apply the standards and tests indicated by the Florida statute and Florida decisions, with an eye to the decisions of

this Court, only to avoid transcending the limitations imposed upon Florida by the due process clause of the United States Constitution as it has been interpreted by this Court. The situation, therefore, is exactly the same as if this were an appeal from a decision of the Supreme Court of Florida.

## II

### NEITHER THE DUE PROCESS CLAUSE NOR THIS COURT'S CLARIFICATION OF THE PERMISSIVE LIMITS OF DUE PROCESS COMPELS THE ASSERTION OF *IN PERSONAM* JURISDICTION IN THE INSTANT CASE.

Where the federal court in a diversity jurisdiction case, applying the law of the state of the forum, finds as a fact that the foreign corporation is not doing business in that state and is therefore not subject to *in personam* jurisdiction, no question of due process is presented. If, in the matter of subjecting foreign corporations to its jurisdiction, the law of the forum has not yet gone as far as this Court will now permit, it is for the Florida legislature and the Florida Supreme Court, and not for the federal courts, to consider whether the line should be kept in its present place or extended further. This principle was well stated in *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193 (1 Cir., 1948) at p. 195, where the Court said:

> "* * * It now develops from the Supreme Court's decision in *International Shoe Company* v. *State of Washington*, 1945, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057, that the constitutional limitations on jurisdiction over a foreign corporation are not as strict as they were once thought to be. The consequence of this discovery is that it might be possible to extend the Massachusetts statute

to some instances where the courts of that state have previously interpreted it to be inapplicable.

"Whether this be so or not we think it is no business for a federal court to meddle in. In this case we take the Massachusetts interpretation of a Massachusetts statute. It does not at all follow that the state court would give a different interpretation of the statute even though constitutional inhibitions upon doing so were removed. Courts frequently have several grounds upon which a conclusion may be based, although only one of them may be expressed. We think it is the business of the federal court to follow the state court's construction of its own statute, assuming, of course, that it does not transgress constitutional limitations, until the state court announces a different rule. We do so here. * * *"

Although the instant case was removed to the federal court, the Federal Rules of Civil Procedure (4 (d) (7)) made applicable the Florida statute (Fla. Stat. Ann., Sec. 47.17) setting forth the means by which a foreign corporation can be subjected to process in the courts of that State. This statute provides that absent certain supervisory officers or agents, "service may be made upon any agent *transacting business* for it in this state" (Emphasis supplied). Basically, therefore, the only issue is whether the respondent was actually doing business in Florida. If it was not, Briardy, on whom service was effected, could not have been "transacting business" for it in the State.

All this has nothing to do with due process or with the academic problem of whether it is fair and reasonable for a state to require foreign corporations, not transacting business in the jurisdiction, to nevertheless defend suits in

that forum. The legislature of Florida, in its wisdom, did not attempt to subject foreign corporations, who were not actually "transacting business" in Florida, to suits in that State. Had it attempted to provide for or exercise jurisdiction over foreign corporations such as the respondent, which have no commercial dealings and negligible contacts in the State but which have some minor employee occasionally present in Florida on duties which in some way benefit the corporation, some rather serious constitutional issues might well have been presented. But that is a different case and wholly irrelevant here. Suffice it to say, a contention "that federal due process compels the State to open its courts to such a case has no substance." (*Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 440).

The true relationship between the local law, as defined by the state of the forum, and the decisions of this Court in this type of case was rather pointedly and very clearly expressed by the Court of Appeals for the Fifth Circuit in *Rosenthal* v. *Frankfort Distillers Corp.*, 193 F. 2d 137, 141 (1951) [cited by that Court in its majority opinion in the instant case] as follows:

> "Appellant's insistence, that the later decisions[8] of the Supreme Court of the United States have made inapplicable the decisions cited and relied on by appellee, and the district judge, misconceives the primary question at issue. This is not, as appellant seems to think, what permissible reach, within the federal constitution, that court would, under the facts, give to a construction by the state court of the Texas Statutes governing the doing of business in

[8] *International Shoe Co.* v. *State*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95; *Travelers Health Ass'n* v. *Commonwealth*, 339 U. S. 643, 70 S. Ct. 927, 94 L. Ed. 1154.

the state by, and the service of process upon, foreign corporations. It is what construction the Courts of Texas have actually given to the statutes.

"As was well said in *Pulson* v. *American Rolling Mill Co.*, 1 Cir., 170 F. 2d 193 at page 194: 'There are two parts to the question whether a foreign corporation can be held subject to suit within a state. The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it so chooses is a matter for the law of the state as made by its legislature. If the state has purported to exercise jurisdiction over the foreign corporation, then the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution. Const. art. 1 § 8, cl. 3; Amend. 14. This is a federal question and, of course, the state authorities are not controlling. But it is a question which is not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation.' Cf. *Employers' Liability* v. *Lejeune*, 5 Cir., 189 F. 2d 521."

Petitioner, in urging before this Court that the courts below erred in failing to follow "the formula of this Court laid down in *International Shoe Company* v. *State of Washington*" (Petitioner's Brief, p. 3), indicates, we believe, a complete misunderstanding of just what was involved in that case. The issue presented in the *International Shoe* case was whether the determination by the Supreme Court of the State of Washington that the Shoe Company, a foreign corporation, was subject to service of process in the

State of Washington, in an action brought by the State to collect an unemployment compensation tax, violated the due process clause of the Constitution. The question was solely one of the *constitutional power* of the State of Washington to assert personal jurisdiction over the foreign corporation and the holding was that the determination by the highest court of the State of Washington that under the law of Washington the Shoe Company's activities within the state amounted to "doing business", did not violate any provision of the U. S. Constitution. In its opinion, this Court reviewed what the Supreme Court of Washington had held and sustained that holding as not violating the requirements of due process. As Mr. Justice Stone pointed out (326 U. S. at p. 314):

> "The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there."

The suggestion implicit in petitioner's position is that this Court in the *International Shoe* case automatically overruled all previous decisions in all courts with respect to what constitutes "doing business" and thereupon established some new, all-controlling federal test of "doing business".

Petitioner, in his specification of errors (Brief, p. 11), apparently argues that a federal court, in a diversity jurisdiction case, is bound to assert *in personam* jurisdiction if a finding of "doing business" on the facts presented would not be unconstitutional as violating due process. He would compel the federal court thus to take jurisdiction, even though the law of the state of the forum is in conflict with such a concept of "doing business" and requires a greater amount of activity on the part of a foreign corporation before the latter can be subjected to an *in personam* action. It is submitted that this Court has already rejected any such argument in *Perkins v. Benguet Consolidated Mining Co.*, 342 U. S. 437 at p. 440 (1952), where it was pointed out:

> "The answer to the question of whether the state courts of Ohio are open to a proceeding *in personam*, against an amply notified foreign corporation, to enforce a cause of action not arising in Ohio and not related to the business or activities of the corporation in that State rests entirely upon the law of Ohio, unless the Due Process Clause of the Fourteenth Amendment compels a decision either way.
>
> "*The suggestion that federal due process compels the State to open its courts to such a case has no substance.* (Emphasis supplied.)
>
> "'Provisions for making foreign corporations subject to service in the State is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State.' *Missouri, P. R. Co. v. Clarendon Co.*, 257 U. S. 533, 535."

There is, therefore, clearly no basis for any argument that the federal due process clause *requires a state to exercise in personam jurisdiction over a foreign corporation* where that state's legislature and its courts have not seen fit to either provide for, or assert, such jurisdiction in a given factual situation. Actually, due process *limits* a state in the exercise of *in personam* jurisdiction over a foreign corporation. As this Court, after pointing out that distinction, concluded in the *Perkins* case, *supra*:

> "* * * Consideration of the circumstances which, under the law of Ohio, ultimately will determine whether the courts of that State will choose to take jurisdiction over the corporation is reserved for the courts of that State." (p. 448)

Petitioner here, by construing the *International Shoe* case decision as determining how far a state *must* go in asserting jurisdiction, instead of how far a state *may* go, has misinterpreted the holding of that case and completely disregarded the opinion of this Court in the *Perkins* case.

## III

## THE COURTS BELOW CORRECTLY DECIDED THAT THE RESPONDENT WAS NOT "TRANSACTING BUSINESS" IN FLORIDA.

The record shows conclusively that the respondent's business is operated entirely outside the State of Florida. Not only does it have no property, office, place of business, directory listing, or representative stationed in Florida, but it neither solicits business, nor sells its product, nor collects money in that State (*supra*, pp. 5-13). Hence, it is

sheer fantasy to argue that the respondent is "transacting business" in Florida.

The only issue before this Court is whether, upon these undisputed facts, the respondent, a foreign corporation, must litigate in the courts in Florida the cause of action asserted against it. That is a question to be decided by the local law of the forum and is, in the instant case, a question primarily of statutory law. In deciding that respondent should not be forced to litigate in Florida this transitory cause of action, arising outside of that State, the two federal courts below necessarily construed and applied the Florida statute (Fla. Stat. Ann., Sec. 47.17) which provides that service of process on such a corporation "may be made upon any agent *transacting business* for it in this state." (Emphasis supplied.) No decision by the highest court of Florida has in any way expanded the normal meaning of the term "transacting business". With resort to nothing more than the plain meaning of the words of the controlling Florida statute, the holding of the two federal courts below that the respondent was not subject to *in personam* jurisdiction under the circumstances presented is unassailable.

An all-encompassing definition of what constitutes the doing of business by a foreign corporation is neither possible nor desirable. Reason and a regard for the realities dictate that each case be judged on its facts and viewed in the actual light of the commercial activities of the corporation in the forum as related to its entire operation. As a minimum, at the very least, there must be continuous and substantial prosecution of the essential business of the corporation within a state before it can be said that it is there "doing business" to an extent sufficient to justify a court in

accepting jurisdiction over it; it is not doing business within a state unless all its activities in the state form an integral part of its business, as distinguished from incidental operations.

The fact that the cause of action here is a transitory one, which did not even arise in the state of the forum, necessarily makes the instant case an even weaker one for asserting *in personam* jurisdiction. This is not a situation where the petitioner has been aggrieved by some tort committed in Florida by one of the two circulation roadmen employed by defendant. In the instant case, the alleged libel of the petitioner was in no way whatsoever connected with Briardy's activities in Florida. As appears above (*supra*, p. 7), no part of the respondent's editorial preparation of the magazine, wherein the claimed defamation appeared, occurred in that State. In fact, every activity of this foreign corporation having anything whatever to do with the production, publication, sale or distribution of the alleged libelous matter took place wholly outside of Florida (*supra*, pp. 7-11). Thus, even if the *injury* of which the petitioner complains occurred in part in Florida, it is manifest that the *cause of action* did not arise out of any activities of the respondent there. Although Look Magazine was circulated and sold within Florida by wholesalers to retail outlets and by such retailers to the public, *it was not sold or distributed there by the publisher-respondent*. This is not disputed and there is no claim that the wholesaler acted as an agent of respondent in the sale of its magazines in Florida. In fact, in the state court below, petitioner's service on the News Company "as agent" of the respondent was later quashed on *petitioner's own motion* (R. 14-15) after the facts had been fully developed

in depositions of The American News Company and of respondent.

It is apparent that Judge Russell, in his dissenting opinion below, has misinterpreted the record when he relied upon the sale and circulation of LOOK in Florida to justify his conclusion that respondent should be subjected to the jurisdiction of the court in Florida. Circulation and sale *by others* is obviously not a doing of business within the state of the forum by the respondent. If, as already pointed out, due process cannot compel a state to assert *in personam* jurisdiction *generally* over foreign corporations, *a fortiori*, due process, in its broadest interpretation, cannot require a state to make its *in personam* jurisdiction "over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State".

*Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437 at p. 440;
*Missouri, P. R. Co.* v. *Clarendon Co.*, 257 U. S. 533, at p. 535.

No case in either the state or federal courts in Florida has sustained service upon a foreign corporation as "transacting business" there, unless the facts before the court showed, beyond question, that said foreign corporation was engaged in *both* (1) systematically and continuously employing local agents regularly stationed in the State as salesmen to solicit orders for the sale of its product, *plus* (2) some other activities carried on through such resident salesmen within the State.

The highest court of Florida applied the doing business test in *George A. Hormel & Co.* v. *Ackman*, 117 Fla. 419, 158 So. 171 (1934). The *Hormel* case, relied upon by peti-

tioner in the courts below and cited and referred to in the opinion of the Court of Appeals, presented the typical "solicitation plus" situation which both state and federal courts, in practically all cases, have held affords a basis for jurisdiction over the foreign corporation. In the *Hormel* case, the foreign corporation's employee, upon whom service was effected, solicited orders for the defendant's merchandise and collected monies due to the defendant in Florida. He was regularly stationed by the defendant in Florida and resided there. The merchandise shipped in fulfillment of such orders was delivered by defendant in Florida, by its own trucks. The Florida Supreme Court cited and adopted the reasoning of, *International Harvester Co.* v. *Commonwealth of Kentucky*, 234 U. S. 579 that continuous solicitation of orders through local agents of a foreign corporation, plus other activities in the state of the forum by such local agents, is sufficient upon which to base jurisdiction. In the instant case, the part-time and very limited activities of the two circulation roadmen, who from time to time go into Florida, do not even reach the level of "solicitation", much less "solicitation plus". Moreover, no local, resident employee is maintained by respondent in Florida for any purpose. The entire record in the case at bar fails to indicate the slightest evidence of any fixed, permanent or continuous representation of respondent in Florida either through an office or through an agent or employee regularly located there.

In determining the essentially factual issue as to whether the respondent was transacting business in Florida, the federal courts below quite properly, in the absence of factually similar Florida court cases, considered the decisions in cases in other circuits where libel suits, based upon causes of action

not arising in the forum, were sought to be maintained against foreign corporation publishers having minimal contacts in the state of the forum.

Significant is the decision in *Layne* v. *Tribune Co.*, 63 App. D. C. 213, 71 F. 2d 223 (1934), in which this Court denied certiorari, 293 U. S. 572. There the publisher of the Chicago Tribune, an Illinois corporation, was sued for libel in the District of Columbia. Service of process was made on the defendant's employee who had charge of the Washington office and of the gathering of news in Washington. Defendant moved to quash service and the Court of Appeals affirmed the decision of the lower court granting defendant's motion. Defendant maintained an office in Washington with four reporters and two telegraph operators operating a leased telegraph wire between its Washington and Chicago offices. The reporter's job was to collect Washington news and forward it to Chicago. All expenses and salaries of the Washington office were paid from Chicago. While the Washington office employees had no authority to make any contracts or collect any monies for the corporation, the head of the Washington office did have authority to purchase supplies and to employ additional telegraph operators. Nevertheless, the Court held that the corporation was not doing business in the District of Columbia, and was not subject to service of process there.

The decision of the U. S. Court of Appeals in *Whitaker* v. *MacFadden Publications, Inc.*, 105 F. 2d 44 (D. of C., 1939), gives ample support for the conclusion of the courts below that the limited duties performed by the respondent's two circulation roadmen, which are far less than those of the employees involved in the *Whitaker* case, do not amount to "transacting business" in Florida. In that case, the following facts appeared without dispute (p. 44):

> "Defendant is a New York corporation. It sells and ships its magazines to, and collects payment from, the District News Company, of Washington, D. C. The District News Company resells to and collects from retailers and street vendors. Pendergast and four assistants, for remuneration which defendant pays by check from New York, supervise and promote sales of the magazines among the street vendors who buy their stock from the District News Company. Pendergast solicits neither advertising nor subscriptions, and neither collects nor forwards money to defendant. Neither the District News Company nor Pendergast is authorized to make any contracts for defendant. Defendant has no place of business in the District, but the District News Company furnishes Pendergast with an office and telephone on its premises without cost to him or to defendant."

Upon these facts, the Court of Appeals affirmed an order granting the defendant's motion to quash service, holding that the defendant corporation was not doing business within the District in such manner and to such extent as to warrant the inference that it was present there.

Other libel cases cited in the opinion below (R. 113) are to the same effect:

> *Cannon* v. *Time, Inc.*, 115 F. 2d 423 (4 Cir., 1940);
>
> *Street & Smith Publications, Inc.* v. *Spikes*, 120 F. 2d 895 (5 Cir., 1941);
>
> *Neely* v. *Philadelphia Inquirer Co.*, 61 App. D. C. 334, 62 F. 2d 873 (1932).

Similarly, there was strong precedent in other decisions, involving the activities of travelling representatives, for

finding in the case at bar that performance of *some* services for it by a very minor employee of a foreign corporation does not entitle—much less compel—a court to assume personal jurisdiction over that corporation.

In *Echeverry v. Kellogg S. & S. Co.*, 175 F. 2d 900 (2 Cir., 1949), the foreign corporation, Kellogg Company, sold telephone and communications equipment manufactured by it to its wholly-owned subsidiary, Telephone Corporation, a New York corporation. This equipment, the latter corporation sold at retail to industrial users in a prescribed territory which included New York as well as portions of several other states. Kellogg Company also had an employee, Jones, regularly located in New York at the office of Telephone Corporation. The duties performed by Jones were described as follows:

> "His sole duty and authority as an employee of Kellogg Company is to periodically call upon certain designated customers of Kellogg Company located in the New York area and to discuss with them such problems as may arise from time to time in their use of equipment purchased from Kellogg Company. His efforts in this connection are designed to maintain customer good-will and satisfaction with the use of Kellogg Company products. His employment does not include the solicitation, nor does it authorize the acceptance, of orders from such customers for Kellogg Company."

and

> "* * * He has not, and never had, authority to accept orders for Kellogg Company in New York. His only duty as such employee of Kellogg Company in New York is, and always has been, to call on certain customers to get information from them with

respect to their present and prospective use of products made or sold by Kellogg Company, and to transmit that information to Kellogg Company in Chicago." (at p. 902)

The Court of Appeals on these facts held that the Kellogg Company was not doing business in New York.

In *DeSanta* v. *Nehi Corporation,* 171 F. 2d 696 (2 Cir., 1948), the defendant, a foreign corporation, sought to dismiss the complaint, in an action instituted in the state court but removed to the federal court, on the ground (1) that it was not doing business in New York, and (2) that Hughes, the person upon whom the summons had been served, was not its "managing agent", as required by the New York Civil Practice Act. Hughes, whose activities were relied upon as amounting to "transacting business" in New York, was a travelling representative of a foreign corporation whose job included inspection of local bottling plants and the making of suggestions to such plants to aid them in increasing their business. The Court of Appeals, affirming the lower court's dismissal, stated (pp. 698-699):

"Nehi Corporation is a Delaware corporation having its principal place of business in Georgia, where it manufactures concentrates to be used by purchasers to produce carbonated drinks. Its concentrates are sold to independent bottling plants located in the various states and these plants, using a formula furnished by Nehi Corporation, manufacture and bottle the soft drinks and sell them to retail stores. Nehi Corporation does business with several such independent bottling plants located in six cities in the state of New York. Orders for concentrates are sent by the bottling concerns to Nehi's place of business in Georgia where they are either accepted

> or rejected. Shipment of the goods is made from there and payment therefor is received there. Nehi has no office and no sales agents within the state of New York. It has a representative, Mr. Hughes, upon whom the summons and complaint were served, who visits the bottling plants at sporadic intervals. His territory includes all of New England as well as the state of New York. His duties are to inspect the bottling plants from the standpoint of sanitation, to obtain samples of their products and to forward such samples to Nehi in Georgia for analysis. He also makes suggestions as to advertising and business practices designed to aid the bottling plants in increasing their business, but such suggestions are not mandatory instructions. It is unnecessary, we think, to recite more of the facts as found by the court. We agree with its conclusion that the defendant does not transact business in the state of New York in a maner to subject it to suit here, and that Mr. Hughes was not the 'managing agent' of the defendant."

Certainly, the activities of Pendergast and his four assistants in the *Whitaker* case; of Hughes in the *DeSanta* case; and of Jones in the *Echeverry* case far exceeded those of the two non-resident minor employees of the respondent who from time to time travelled part of Florida. The restricted and limited activities of these two circulation roadmen have been fully described (*supra*, pp. 11-13). They solicited no orders for sales of respondent's magazines or of advertising in such magazines or of anything else. They collected no monies for respondent and could not commit the foreign corporation to anything. Neither of them was a resident of Florida or was assigned or stationed there as a permanent representative of defendant for any purpose. Their presence in Florida, which

amounted to no more than twenty per cent of their time, was in the course of their multi-state travel, during which their sole duties were to check on whether respondent's magazines were as well displayed as those of its competitors, and to receive and forward to the respondent in New York City their own or retailers' criticisms of displays and distribution (R. 46, 80-81). And, despite the contrary finding of the two courts below, the petitioner would have this Court believe that Briardy, one such minor employee, in a real sense represents the respondent in Florida!

All of the cases discussed above make it abundantly clear that where a foreign corporation has only such minor contacts in the forum, the courts will decline jurisdiction. No decision of this Court or of any state or federal court in Florida has even indicated the slightest support for petitioner's contention (Brief, pp. 21-22) that so long as transactions which might in any way benefit a foreign corporation take place in the state where service has been attempted, and so long as the person upon whom service has been made is employed by the foreign corporation, the court of the forum is not only permitted but compelled to assert jurisdiction. The decisions cited by the Court of Appeals in the opinion below, and discussed herein, conclusively rebut this contention.

## IV

## THE HOLDING OF THE COURTS BELOW IN NO WAY CONFLICTS WITH PRIOR DECISIONS OF THIS COURT OR WITH DECISIONS IN THE OTHER CIRCUITS.

### A. There is no conflict between the holding of the courts below and decisions of the other Circuits.

Petitioner argues (Brief, p. 14) that the holding of the courts below conflicts with decisions of the First, Second and Seventh Circuits. Actually, there is no such conflict.

The rule in the First Circuit is explained at length in *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193, discussed, *supra*, at pp. 14-17. *Schmikler* v. *Petersime Incubator Co.*, 177 F. 2d 983 (1949), cited by petitioner as showing such conflict (Brief, p. 14), involved a clear application of the "solicitation plus" rule which prevails in Massachusetts, the state of the forum, and in no sense departed from the rule of the *Pulson* case. The *Pulson* case was specifically followed and relied upon by the Fifth Circuit in *Rosenthal* v. *Frankfort Distillers Corp.*, 193 F. 2d 137 (cited with approval by the Court of Appeals in its opinion below and discussed, *supra*, pp. 18-19).

The case cited by petitioner in the Seventh Circuit, *Consolidated Cosmetics* v. *D-A Pub. Co., Inc.*, 186 F. 2d 906 (1951) involved a federal question, infringement of plaintiff's registered trademarks "Tabu" and "Taboo" by defendant's magazine entitled "Taboo". The foreign corporation, as it is required to do for Second Class mailing privileges under the Postal Laws, "designated Mount Morris [Illinois] as the public office where its business is transacted during its usual business hours" (p. 907). The test to be applied in a diversity jurisdiction case was not therein discussed. Shortly after that decision, however, the same court did pass upon the question of "doing business" in a diversity jurisdiction case. In *Canvas Fabricators* v. *William E. Hooper & Sons Co.*, 199 F. 2d 485 (1952), that court applied the law of the forum and held that under the Illinois test of "doing business", there being no showing of "solicitation plus", the federal court was correct in declining jurisdiction over the foreign corporation (discussed, *supra*, p. 15).

Finally, petitioner says that the rule of the Second Circuit, as applied in *French* v. *Gibbs Corporation*, 189

F. 2d 787 (1951), is in conflict with the holding below in the case at bar. In the *French* case, the defendant corporation concededly had been doing business in the State of New York until a month prior to the service of process upon it. It had not wholly withdrawn from the state, and the claim in suit was an action for breach of a contract that had been made, performed and breached in the State of New York. Under these circumstances, the court held that the defendant was still subject to suit in New York. Not only is there no conflict between the decision of the Fifth Circuit in the instant case and the rule obtaining in the Second Circuit, but two cases in the Second Circuit, decided a few years after the *International Shoe* case, show accord rather than diversity on similar factual situations (*DeSanta* v. *Nehi Corp.*, 171 F. 2d 696; *Echeverry* v. *Kellogg S. & S. Co.*, 175 F. 2d 900, discussed, *supra*, pp. 29-31).

None of the cases cited by petitioner involved a situation which even remotely resembles the facts in the instant case, and the petitioner is, therefore, wholly unwarranted in urging that there is a conflict in decision between the judgment of the Court of Appeals in this case and any of these decisions in the First, Second and Seventh Circuits.

**B. The holding below does not conflict with any decision of this Court.**

Petitioner's contention that there is a conflict between this Court's decision in the *International Shoe* case and the decision of the Court of Appeals below is based entirely upon an erroneous premise. He suggests that if a federal court in a diversity jurisdiction case can, within the limits of federal due process, assert jurisdiction in a given case, it

is compelled to do so, irrespective of the law of the forum (Petitioner's Brief, pp. 11-12). As already pointed out (*supra*, pp. 16-22), this Court, in the *International Shoe* case, redefined the constitutional limits on how far a state *might go* in asserting jurisdiction over a foreign corporation; it indicated the irreducible minimum of activities in, or contacts with, the forum that must exist to satisfy the requirement of due process; it did not purport to tell the state how far it *must* or even should go. Any possible doubt on this score was removed by this Court in *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437 at 440, 448.

But even if the courts below had looked to the *International Shoe* case, as an affirmative standard as to what is "doing business", it is submitted that the result would not have been different. In that case, it must be noted that: (1) the State was the plaintiff which sought to regulate only those activities of the foreign corporation carried on within that State's own boundaries; (2) resident agents permanently located in the State regularly solicited sales of products for the foreign corporation; (3) the foreign corporation's activities within the State, though mainly solicitation of sales of products through local resident agents, were not strictly limited to such solicitation; and (4) the cause of action arose directly out of the activities of the foreign corporation within the State and the relief sought was with respect to those activities only.

As we have already stressed earlier in this brief (*supra*, pp. 5-13, 24-25), in the case at bar there is (1) no resident employee of the respondent in Florida for any purpose (unlike the 11 resident salesmen in the *International* case); (2) no regular location or office of any kind of the respond-

ent in Florida (unlike the showrooms and merchandise displays in the *International* case); (3) no action brought to enforce an obligation arising out of the respondent's activities within Florida (unlike the *International* case where the State of Washington was suing to collect an unemployment compensation tax levied on the earnings only of those 11 salesmen regularly residing in, and employed full time by, the Shoe Company in Washington); and (4) no solicitation of orders for respondent's product on a regular, systematic, continuous or any other basis (unlike the *International* case where the 11 resident salesmen were engaged in the State of Washington full time, exhibiting merchandise and continuously soliciting orders for the same). In fact, in the instant case, there has been no solicitation of business whatever by any representative of the respondent in the state of the forum. It cannot be said, therefore, that the holding of the courts below is in any sense in conflict with this Court's decision in the *International Shoe* case for, as is perfectly apparent, the facts here presented are entirely different and there exists no issue as to whether the state of the forum has exceeded the constitutional limits imposed by the due process clause.

**C. There is no issue presented by petitioner that warrants review by this Court.**

This is not a case, as petitioner seems to imply, where the lower courts declined jurisdiction on the ground that it would have been a violation of due process to have asserted it. The situation is not like that presented by *State Tax Commission* v. *Van Cott*, 306 U. S. 511, where the Utah Supreme Court in its opinion had stated that it reached its decision because it thought it was controlled by constitu-

tional limitations imposed by this Court in a specific decision. The instant case is more nearly analogous to *Radio Station W. O. W.* v. *Johnson,* 326 U. S. 120, 129, where this Court held:

> "This brings the situation clearly within the settled rule whereby this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law."

Nowhere in the opinion of the Court of Appeals is there any indication that the result reached was dictated by federal constitutional restrictions. Rather, the entire tenor of its opinion, in the light of its own prior decisions which it specifically cited as more fully stating its views, clearly indicates that it applied the law of Florida to the question at issue and found as a fact that respondent's activities in, or contacts with, that State were insufficient to warrant invoking jurisdiction. There is, therefore, "no occasion to discuss how far recent decisions might allow a state to go in extending its jurisdiction in this field. The question of federal constitutional limitations is not here before us." (*Pulson* v. *American Rolling Mill Co.,* 170 F. 2d 193, 195).

## CONCLUSION

The instant case involves no constitutional issue and no federal question. It involves no conflict in decisions between the Circuits or between the holding below and decisions of this Court. It simply represents an unreasonable determination on the part of petitioner to try his case in a jurisdiction of his own choosing, despite the fact that

respondent's minimal contacts in Florida impelled both federal courts below to conclude as a fact that, under the law of Florida, respondent is not "transacting business" in that State.

If jurisdiction over such absent foreign corporations were to be extended as petitioner contends, then practically every manufacturer in this country of any nationally sold products (whether magazines or other merchandise) would be subject to suit in each and every one of the forty-eight states. Surely, no legislature and no court could ever have intended such a result or that tenuous a construction of "transacting business".

**THE JUDGMENT OF THE COURT OF APPEALS WAS CORRECT AND SHOULD BE AFFIRMED.**

Respectfully submitted,

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*Of Counsel:*
STERN & REUBENS

February 26, 1953

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952

No. 287

AL POLIZZI

*v.*

COWLES MAGAZINES, INC.,

*Petitioner.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR CLARIFICATION AND TO STAY MANDATE

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## PETITION FOR CLARIFICATION OF OPINION OF REVERSAL DATED JUNE 1, 1953, AND TO STAY MANDATE

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By opinion, dated June 1, 1953, this Honorable Court reversed the judgment of the United States Court of Appeals for the Fifth Circuit heretofore entered on May 23, 1952 and, at the conclusion of said opinion, stated:

> "We express no opinion whether Respondent was 'doing business' in Florida within the meaning of the due process requirements set out in *International Shoe Co.* v. *Washington*, 326 U. S. 310, because Respondent has not contended that the *International Shoe* test is not met. Nor do we decide whether the District Court acquired jurisdiction of the person of Respondent by proper service, because the lower courts did not pass on the question of service. Therefore, the judgment of the Court of Appeals is reversed, and the cause is remanded to the District Court to take jurisdiction of the action and determine

whether the District Court acquired jurisdiction of Respondent by proper service."

Petitioner respectfully requests that the Court clarify the opinion of reversal.

This Court, in reversing the judgment of the Court of Appeals, directs the District Court to determine whether it has jurisdiction over this petitioner, Cowles Magazines, Inc. Hence, the District Court must necessarily determine whether said petitioner, at the time of service of process, was "doing business" within the State of Florida. Both parties on the argument before this Court conceded that this question must be determined in the first instance under the law of the State of Florida, since jurisdiction is based solely on the diversity of citizenship of the parties (*Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64) and service of process was made pursuant to Florida Statute (Fla. Stat. Ann., Sec. 47.17). This Court's opinion, however, omits any instruction to the District Court that Florida law governs.

Petitioner respectfully submits that, without clarification in this respect, the District Court is without any guide and, therefore, might well err as to what law to apply in determining the question this Court has sent back to it for decision. Petitioner, therefore, respectfully requests clarification and amplification of this Court's opinion to the effect that (1) *in personam* jurisdiction over this petitioner is to be determined by the applicable statutory and case law of the State of Florida (*Pulsan* v. *American Rolling Mill Co.*, 170 F. 2d 193, 195, *Rosenthal* v. *Frankfort Distillers Corp.*, 193 F. 2d 137, 141) and (2) nothing in the Constitution or other federal law either prohibits or compels the assertion by the United States District Court in Florida

of jurisdiction over this petitioner. (*Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 440).

Wherefore, petitioner respectfully requests that this Court stay the mandate and so clarify its opinion.

Respectfully submitted,

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I certify that this petition is presented in good faith and not for delay.

MANUEL LEE ROBBINS
*Counsel for Petitioner*

June 9, 1953.